

Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency

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SPECIAL PROJECT

CAPITAL PUNISHMENT IN 1984: ABANDONING THE PURSUIT OF FAIRNESS AND CONSISTENCY

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INTRODUCTION

State prison officials carried out eleven executions in the first seven months of 1984,¹ half of the twenty-two inmates executed since 1977² when a decade-long moratorium on capital punishment in the United States³ came to an end. Although the rate of executions is increasing, it

¹ The persons executed between January 1984 and July 1984 were Anthony Antona in Florida on January 26, John Taylor in Louisiana on February 29, James Autry in Texas on March 14, James Hutchins in North Carolina on March 16, Ronald O'Bryan in Texas on March 31, Arthur Goode in Florida on April 5, Elmo Sonnier in Louisiana on April 5, James Adams in Florida on May 10, Carl Shriner in Florida on June 21, Ivon Stanley in Georgia on July 12, and David Washington in Florida on July 13. NAACP Legal Defense and Educ. Fund, Inc., *Death Row*, U.S.A. 1 (Aug. 1, 1984) (unpublished compilation) [hereinafter cited as *Death Row*, U.S.A.].

² The eleven persons executed between 1977 and 1983 were Gary Gilmore in Utah on January 17, 1977, John Spengelink in Florida on May 25, 1979, Jesse Bishop in Nevada on October 22, 1979, Steven Judy in Indiana on March 9, 1981, Frank Coppola in Virginia on August 10, 1982, and Charlie Brooks in Texas on December 7, 1982, Johnny Evans in Alabama on April 22, 1983, Jimmie Lee Gray in Mississippi on September 2, 1983, Robert Sullivan in Florida on November 30, 1983, Robert Wayne Williams in Louisiana on December 14, 1983, and John Eldon Smith in Georgia on December 15, 1983. *Death Row*, U.S.A., *supra* note 1, at 1.

³ In the latter half of the 1960s several groups opposing capital punishment supported challenges to the death penalty in state and federal appellate courts. *THE DEATH PENALTY IN AMERICA* 3, 22-26 (H. Bedau 3d ed. 1982) [hereinafter cited as H. Bedau]; J. GORECKI, *CAPITAL PUNISHMENT* 87-95 (1983); Polsby, *The Death of Capital Punishment?* *Furman v. Georgia*, 1972 SUP. CT. REV. 1, 2; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., *CAPITAL PUNISHMENT* 1981, at 2 (1982) [hereinafter cited as *CAPITAL PUNISHMENT* 1981]. These constitutional challenges resulted in an unofficial moratorium on executions in the United States beginning in 1967. According to Professor Bedau, "[t]he de facto moratorium on executions [was] created in 1967 by the litigational efforts of the NAACP Legal Defense and Educational Fund." Bedau, *supra*, at 24. According to the United States Department of Justice, the "unofficial moratorium on executions stemm[ed] from strong pressures mounted by forces opposing capital punishment." *CAPITAL PUNISHMENT* 1981, *supra*, at 2. Professor Bedau identified a critical period of decline in the number of executions beginning in the 1940s. Bedau attributed this decline to

social forces of several sorts [including] growing doubts about the morality of capital punishment, consciousness among high officials that most of western Europe had abandoned the death penalty, abatement of the "crime wave" of the 1930s, mounting scientific evidence that undermined belief in the deterrent efficacy of executions and strengthened belief in its racially discriminatory use, [and] increased willingness in appellate courts to delay executions in order to consider constitutional issues . . .

H. Bedau, *supra*, at 25.

Heightened judicial scrutiny of the death penalty during the moratorium on executions culminated in 1972 with the landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972). See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., *CAPITAL PUNISHMENT* 1982, at 2 (1983) [hereinafter cited as *CAPITAL PUNISHMENT* 1982]. In *Furman*, the Supreme Court considered whether the death penalty violates the eighth amendment's prohibition against "cruel and unusual punishments." *Furman* consisted of a one paragraph per curiam decision accompanied by nine separate opinions covering 243 pages in *United States Reports* and constituting the longest case report in Supreme Court history. B. WOODWARD & S. ARMSTRONG, *THE*

remains low in comparison with the rate throughout much of this century. There were well over one hundred executions per year between 1930 and 1950, and over fifty executions per year between 1950 and 1960.⁴ The relatively low number of executions in the last seven years reflects the uncertainty caused by recent developments in the judicial handling of constitutional issues surrounding capital punishment⁵ and the lengthy procedures now required before a death sentence can be carried out,⁶ rather than declining death row populations⁷ or decreased public support for the death sentence.⁸

BRETHREN 220 (1979). Although the judgment in *Furman*, striking down the capital sentencing procedures of Georgia and Texas, had the effect of invalidating nearly every capital punishment statute in the nation, see *infra* text accompanying notes 89-91, the decision failed to decide whether the eighth amendment prohibits capital punishment. Six Justices in *Furman* considered whether any death penalty violates the eighth amendment, but three out of five Justices in the majority decided the case on narrower grounds. See *infra* notes 80-85 and accompanying text. In 1976 the Court held definitively that capital punishment is not, per se, cruel and unusual. See *Gregg v. Georgia*, 428 U.S. 153 (1976). The decision in *Gregg* was announced on July 2, 1976, and the first execution since 1967 was carried out approximately seven months later. See *infra* note 149 and accompanying text.

⁴ CAPITAL PUNISHMENT 1981, *supra* note 3, at 8. For the exact number of persons executed per year between 1930 and 1967, see *Furman v. Georgia*, 408 U.S. 238, 291 n. 40 (1972) (Brennan, J., concurring).

⁵ See Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 8-12 (1982). See also *Coker v. Georgia*, 433 U.S. 584, 614 (1977) (Burger, C.J., dissenting) (noting that "[c]onsiderable uncertainty was introduced into this area of the law by this Court's *Furman* decision"). One commentator suggested that the Court's failure to hand down clear, consistent capital punishment decisions has allowed the Court to retain control over the development of adequate procedural safeguards. See Combs, *The Supreme Court and Capital Punishment: Uncertainty, Ambiguity, and Judicial Control*, 7 S.U.L. REV. 1, 38 (1980).

⁶ Although the Constitution does not generally guarantee rights of appeal, see *infra* note 392 and accompanying text, all thirty-six states with a valid capital punishment law accord condemned persons an automatic right of review. See *infra* note 743 and accompanying text. In addition to state appellate review, capital defendants may obtain collateral review of state court judgments by a federal writ of habeas corpus. Recently, individual Supreme Court Justices have voiced impatience with execution delays resulting from exhaustive use of post-sentencing procedures for challenging the validity of particular death sentences. See *infra* notes 556-59 and accompanying text.

⁷ Since 1972, when 600 condemned persons were removed from death row because of the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), see *infra* note 97, the number of persons sentenced to death has risen steadily. The NAACP Legal Defense and Educational Fund, Inc. estimates that by August 1, 1984, the death row population had grown to 1,401 inmates including 590 blacks and 18 women. Death Row, U.S.A., *supra* note 1, at 1.

⁸ Approximately 73% of nearly 1,600 adults surveyed in a recent poll expressed support for the death penalty. Granelli, *Justice Delayed*, 70 A.B.A. J. 51, 51 (1984). Popular support for the death penalty has risen steadily since the mid-1960s. A substantial majority of Americans favored capital punishment between the late 1930s and early 1950s. Sometime in the 1950s, public support for the death penalty began to erode. In July 1966, one year before the beginning of the 10-year moratorium on executions, see *supra* note 3, only 42% of those polled supported capital punishment. Erskine, *The Polls: Capital Punishment*, 34 PUB. OPINION Q. 290 (1970). Since 1966 public support for capital punishment has increased. In March 1972, before *Furman v. Georgia*, 408 U.S. 238 (1972), 50% of the American public approved of the death penalty. H. Bedau, *supra* note 3, at 87 (citing various reports in THE GALLUP OPINION INDEX). Despite the Court's ruling in *Furman*, public support for capital punishment had

Supreme Court decisions in the 1970s established that the eighth amendment's prohibition against "cruel and unusual punishments" and fourteenth amendment due process considerations require fairness and consistency in capital sentencing.⁹ This standard reflects the principle that death is a unique criminal sanction constitutionally different from other lawful punishments.¹⁰ States can attain fairness and consistency

risen to 57% by November 1972. *Id.* In 1976, the year in which the Supreme Court held that capital punishment is not per se unconstitutional, see *Gregg v. Georgia*, 428 U.S. 153 (1976), public approval for the death penalty stood at 66%. H. Bedau, *supra* note 3, at 85. As noted above, 73% of the American public supported the death penalty in 1983. See Granelli, *supra*, at 51.

Several factors may explain the public's increased support for capital punishment: (1) a corresponding increase in the national crime rate and a concomitant increase in media coverage of violent crimes, see Yunker, *Testing the Deterrent Effect of Capital Punishment*, 19 CRIMINOLOGY 626, 627 (1982); Dike, *Capital Punishment in the United States, Part III: The Practice—Actual and Proposed*, 13 CRIM. JUST. ABSTRACTS 577, 587 (1981); Lotz & Regoli, *Public Support for the Death Penalty*, CRIM. JUST. REV., SPRING 1980, at 55; (2) the influence of "law and order" political platforms beginning in the latter half of the 1960s, see Dike, *supra*, at 587; and (3) a growing acknowledgement of the retributive function of the death penalty, see Lotz & Regoli, *supra*, at 64.

For a detailed analysis of support for capital punishment among members of the legal profession, see Davidow & Lowe, *Attitudes of Potential and Present Members of the Legal Profession Toward Capital Punishment—A Survey and Analysis*, 30 MERCER L. REV. 585 (1978-79). For a discussion of public opinion in Canada, see Vidmar & Dittenhoffer, *Informed Public Opinion and Death Penalty Attitudes*, 23 CANADIAN J. CRIMINOLOGY 43 (1981). Finally, for an analysis of the abolition of the death penalty in Oregon by public referendum in 1964, see Bedau, *The 1964 Death Penalty Referendum in Oregon*, 26 CRIME & DELINQ. 528, 535-36 (1980) (noting that "since 1964, public referenda on the death penalty have been used exclusively to restore, not abolish, the death penalty").

⁹ In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court summarized its earlier decisions in *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana* (S. Roberts), 428 U.S. 325 (1976), and *Roberts v. Louisiana* (H. Roberts), 431 U.S. 633 (1977):

Beginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused.

Thus, the rule . . . follow[ing] from the earlier decisions of the Court [is] that capital punishment be imposed fairly, and with reasonable consistency, or not at all.

Eddings, 455 U.S. at 112; see also *Barclay v. Florida*, 103 S. Ct. 3418, 3443 (1983) (Marshall, J., dissenting) (noting "the Court's past insistence on consistency and fairness in the capital sentencing process"). Together with *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), the Court's decisions in *Furman*, *Gregg*, *Woodson*, *S. Roberts*, and *H. Roberts* establish that the Constitution requires a system of guided discretion in capital sentencing. See *infra* notes 63-188 and accompanying text.

¹⁰ In 1980, the Supreme Court reaffirmed the principle that the death penalty has a unique constitutional status:

As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments: "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the

by combining two methods of controlling capital sentencing discretion: the promulgation of detailed statutory sentencing guidelines,¹¹ and the provision of meaningful appellate review of death sentences.¹² Federal habeas corpus provides an additional means of detecting and rectifying unfair or inconsistent capital sentencing decisions.¹³

The level of discretion in capital sentencing is the degree to which a judge or jury may exercise its own judgment and select its own criteria in determining whether to impose the death penalty. Despite a recommendation by the American Law Institute in 1959 that capital sentencing be guided by statutory lists of aggravating and mitigating circumstances,¹⁴ nearly all modern capital punishment statutes enacted prior to 1972 accorded the sentencing authority broad discretion in determining whether the death penalty was justified in a particular case.¹⁵

community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (quoting *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977) (Stevens, J., plurality opinion)). The trial judge in *Gardner* had imposed the death penalty after rejecting the jury's advisory sentence of life imprisonment. In invoking the death penalty, the trial judge had relied in part on a presentence investigation report that the petitioner had no opportunity to deny or explain. The Supreme Court vacated the trial court's judgment on the ground that the defendant had been denied due process because he was sentenced, at least in part, on the basis of information that he had no opportunity to rebut. See also *Lockett v. Ohio*, 438 U.S. 586, 605 (1977) (Burger, C.J., plurality opinion) (explaining rationale for requiring more reliable procedures in capital sentencing); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, J., plurality opinion) (explaining that more reliable sentencing procedures are needed in capital cases because death penalty is unique in its finality). In *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Brennan noted that "[t]his Court . . . almost always treats death as a class apart." *Id.* at 286-87 (Brennan, J., concurring); see also *id.* at 287 n.34 (collecting Supreme Court cases supporting principle that death is constitutionally different from other punishments); *infra* note 79 and accompanying text.

¹¹ See generally *infra* notes 108-29 and accompanying text.

¹² See generally *infra* notes 374-468 and accompanying text.

¹³ See generally *infra* notes 469-566 and accompanying text.

¹⁴ MODEL PENAL CODE § 201.6 (Tent. Draft No. 9, 1959) (revised and approved in 1962 as § 210.6 of the Proposed Official Draft) (cited in *McGautha v. California*, 402 U.S. 183, 202-03, 205-06 (1971)). Recognizing a need for capital sentencing standards, the draftsmen of the Model Penal Code believed that it was possible for legislatures to identify "the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case." MODEL PENAL CODE § 206.1 comment 3 (Tent. Draft No. 9, 1959) (quoted in *McGautha v. California*, 402 U.S. 183, 205-06 (1971) (emphasis in original)). In *McGautha*, 402 U.S. at 202-08, the Supreme Court criticized the Model Penal Code recommendation because such a scheme necessarily provides only an incomplete list of possible sentencing considerations. The *McGautha* majority concluded that "[f]or a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete." *Id.* at 208. See *infra* note 67 and accompanying text. For additional criticism of lists of statutory mitigating and aggravating circumstances, see *infra* note 117. Section 210.6 of the MODEL PENAL CODE: PROPOSED OFFICIAL DRAFT (1962) is set out in an appendix to the *McGautha* Court's opinion. See 402 U.S. at 222-25.

¹⁵ See *Woodson v. North Carolina*, 428 U.S. 280, 289-292 (1976). Except for four states that abolished capital punishment in the mid-1800s, every American jurisdiction has at some time provided for unguided jury sentencing in capital cases. *McGautha*, 402 U.S. at 200 n.11;

Appellate courts are wary of over-broad discretion in capital sentencing because it allows the sentencing authority to invoke the unique and irrevocable penalty of death in an arbitrary¹⁶ or discriminatory manner.¹⁷

In *McGautha v. California*,¹⁸ the Supreme Court held that the fourteenth amendment does not prohibit absolute discretion in capital sentencing. In *Furman v. Georgia*,¹⁹ however, decided just one year after *McGautha*, the court made a 180 degree turn,²⁰ ruling that "untrammelled" sentencing discretion in capital cases violates the eighth and fourteenth amendments. At the other end of the spectrum, a complete absence of sentencing discretion, created by mandating the death penalty for certain crimes, does not allow consideration of the character of an individual defendant or the particular circumstances of the crime.²¹ Thus in *Roberts v. Louisiana (H. Roberts)*²² the Supreme Court held that mandatory death sentences also violate the eighth and fourteenth amendments.

Although the Court has rejected each end of the discretionary spectrum, it has indicated that statutory guidelines can minimize the risk of arbitrary and capricious action by directing and limiting allowable discretion.²³ In 1976, the Court held that capital punishment laws provid-

see also Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1136 (1953) (providing comprehensive analysis of state statutes according juries absolute discretion in capital sentencing decisions and concluding that "[t]he system [in 1953 was] haphazard and arbitrary in most states").

¹⁶ As the plurality opinion in *Gregg v. Georgia*, 428 U.S. 153 (1976), explained:

The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish.

Id. at 206 (Stewart, J., plurality opinion) (upholding Georgia's new capital sentencing procedures because "the jury's discretion is channeled").

¹⁷ See *infra* note 81.

¹⁸ 402 U.S. 183 (1971).

¹⁹ 408 U.S. 238 (1972).

²⁰ See *infra* notes 92-97 and accompanying text. The Court's treatment of sentencing discretion in capital cases since 1971 has generally been marked by inconsistency. As one commentator observed: "The [eighth] amendment has stayed the same, but the theory of its operation has changed as three- and four-member pluralities have had to confront the logical but disquieting consequences of earlier decisions." Gillers, *supra* note 5, at 11. See also Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1154 (1980) ("the jurisprudence of death has come almost full circle—from . . . discretion . . . to . . . guided discretion . . . and back to . . . discretion").

²¹ Mandatory capital sentencing schemes are disfavored because they invoke the ultimate penalty regardless of any mitigating circumstances. See *infra* notes 133-36, 141 and accompanying text.

²² 431 U.S. 633 (1977). The Supreme Court has decided two capital cases from Louisiana involving a defendant with the surname Roberts. For purposes of clarity, the case decided in 1976, reported at 428 U.S. 280, will be referred to as *S. Roberts*. The case decided in 1977, reported at 431 U.S. 633, will be referred to as *H. Roberts*.

²³ See *infra* notes 114-19 and accompanying text.

ing for guided discretion in sentencing decisions are not unconstitutional because they ensure that the sentencing authority imposes the death penalty in a fair and reasonably consistent manner.²⁴

Furman and its progeny²⁵ established a fairly coherent set of principles defining the permissible extent of death sentencing discretion. These cases indicated that both unbridled discretion and mandatory death sentences are unconstitutional. These cases also indicated that the level of sentencing discretion in capital cases must be suitably directed and limited so as to produce fair and reasonably consistent results. Subsequent decisions have allowed increased discretion in capital sentencing, however, representing a substantial shift by the Court away from these principles.²⁶

The vast majority of post-*Furman* capital sentencing statutes include a list of aggravating circumstances that, if present, will weigh in favor of imposing capital punishment.²⁷ These statutes allow the sentencing authority to impose the death sentence only if it finds at least one such aggravating circumstance.²⁸ Most state statutes also provide a list of mitigating circumstances to guide the sentencing authority in considering certain factors that may warrant leniency.²⁹ This basic framework was designed to produce fair and reasonably consistent capital sentencing decisions by requiring consideration of certain highly relevant factors.³⁰ In 1978, however, a plurality decision by the Supreme Court³¹

²⁴ See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *S. Roberts v. Louisiana* (S. Roberts), 428 U.S. 329 (1976). The Court recently interpreted the rule from these cases in *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all"). See *supra* note 9 and accompanying text.

²⁵ The *Furman* line of cases consists of *Furman* itself, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), *Jurek v. Texas*, 428 U.S. 262 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976), *Roberts v. Louisiana* (S. Roberts), 428 U.S. 325 (1976), and *Roberts v. Louisiana* (H. Roberts), 431 U.S. 633 (1977).

²⁶ See *infra* notes 189-363 and accompanying text.

²⁷ Thirty-four of the thirty-eight states with a death penalty provide the sentencing authority with a statutory list of aggravating circumstances. See *infra* notes 662 and accompanying text.

²⁸ Most states follow the Georgia formulation upheld in *Gregg v. Georgia*, 428 U.S. 155 (1976). Under the Georgia statute, with only limited exceptions, "unless at least one of the statutory aggravating circumstances [herein] enumerated . . . is . . . found [by the factfinder beyond a reasonable doubt], the death penalty shall not be imposed." See GA. CODE § 17-10-30 (1982).

²⁹ See *infra* note 691 and accompanying text.

³⁰ Although the American Law Institute first proposed the use of statutory aggravating and mitigating circumstances in 1959, see *supra* notes 14-15 and accompanying text, states did not begin to adopt the *Model Penal Code* approach until after the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). See *supra* notes 100-01 and accompanying text.

³¹ In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court reversed the death sentence of a getaway car driver convicted for a murder committed by one of her co-felons on the ground that the statute improperly excluded consideration of such mitigating factors as her prior record, age, lack of specific intent to cause death, and relatively minor role in the murder. *Id.*

indicated that the sentencing authority in capital cases may not be limited to exclusive consideration of a statutory list of mitigating circumstances. Instead, the sentencing authority must be permitted to consider any mitigating circumstances that the defense presents.³² A majority of the Court confirmed this rule in 1982.³³

Two decisions in 1983³⁴ indicated that the Supreme Court will also tolerate increased sentencing discretion with regard to aggravating circumstances. In *Zant v. Stephens*³⁵ and *Barclay v. Florida*,³⁶ the Court upheld death sentences even though one of the aggravating circumstances upon which the sentences were predicated was invalid.³⁷ In *Barclay*, the Court also refused to find error in a trial judge's decision to overturn the jury's recommendation of life imprisonment and impose the death sentence, despite the fact that the trial judge relied extensively on his own personal experiences in determining the appropriate punishment.³⁸ In a third 1983 case, *California v. Ramos*,³⁹ the Court suggested that a sentencing authority may rely on factors wholly outside the scope of the statutory aggravating circumstances when imposing capital punishment, as long as at least one statutory aggravating circumstance is also present.⁴⁰

at 597, 604-05; see *infra* notes 150-58 and accompanying text. Although the plurality opinion in *Lockett* stated that the state could not exclude any relevant mitigating circumstance from consideration by the sentencing authority, two Justices filed separate opinions concurring in the judgment but deciding the case on the narrow ground that execution constitutes cruel and unusual punishment when the defendant had no specific intent to kill. See 438 U.S. at 619 (Marshall, J., concurring); 438 U.S. at 621 (White, J., concurring).

³² *Lockett*, 438 U.S. at 604-05.

³³ See *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (interpreting *Lockett*, 438 U.S. 586, as "holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor"). See *infra* notes 161-76 and accompanying text.

³⁴ See *Zant v. Stephens*, 103 S. Ct. 2733 (1983); *Barclay v. Florida*, 103 S. Ct. 3418 (1982).

³⁵ 103 S. Ct. 2733 (1983).

³⁶ 103 S. Ct. 3418 (1983).

³⁷ The Georgia Supreme Court had ruled in a separate case while *Zant*'s appeal was pending that one of the three aggravating circumstances supporting the death sentence in *Zant* was unconstitutionally vague. See *infra* notes 211-13 and accompanying text. In *Barclay*, one of four aggravating circumstances supporting the death sentence was invalid under state law because it was not listed among the statutory aggravating circumstances and the sentencing authority was not permitted to consider factors not included in the statute. See *infra* text accompanying notes 295, 301.

³⁸ In the required written opinion accompanying his sentencing decision, the trial judge in *Barclay* noted that the defendant had committed murder out of racial animus and spoke at length about personal experiences in World War II and the abhorrent nature of racially motivated killings such as those committed in Nazi Germany. See *infra* notes 289-91 and accompanying text; see also *infra* note 317. Although California's current death penalty statute lists a purely racial motive as an aggravating circumstance, the Florida statute in *Barclay* did not. See *infra* note 667 and accompanying text.

³⁹ 103 S. Ct. 3446 (1983).

⁴⁰ *Id.* at 3456 ("Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty . . . [it] is free to consider a myriad of factors to determine whether death is the appropriate punishment."). See *infra* notes 335-63 and accompanying text.

Although *Furman* and its progeny held that the state must suitably direct and limit discretion in the capital sentencing process in order to minimize the risk of arbitrary or capricious action,⁴¹ the Court's recent decisions permit unbridled discretion once the factfinder concludes that the defendant is eligible for the death sentence. The only difference between the Court's present position on allowable discretion in capital sentencing and its discredited position in *McGautha*⁴² is that the current standard requires the presence of a single legislatively defined aggravating circumstance before a judge or jury can impose the death sentence.

Capital sentencing errors occur when the judge or jury imposes the death sentence in an arbitrary or discriminatory manner,⁴³ when the death sentence constitutes excessive punishment in relation to the crime committed,⁴⁴ or when the death sentence is disproportionate in comparison to sentences given other offenders who were convicted of similar crimes in that state.⁴⁵ Increased capital sentencing discretion carries with it a greater risk of errors, suggesting a need for more thorough post-sentencing appellate review procedures. Although the Supreme Court has never expressly held that the eighth amendment requires state appellate review of death sentences,⁴⁶ every capital punishment statute now in use provides condemned persons with a right of appeal.⁴⁷ In

⁴¹ See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

⁴² The Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), implicitly overruled *McGautha*. See *infra* notes 92-97 and accompanying text.

⁴³ See *supra* notes 16, 17 and accompanying text.

⁴⁴ See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (White, J., plurality opinion) ("the Eighth Amendment bars . . . those punishments that are . . . 'excessive' in relation to the crime committed").

⁴⁵ According to one commentator:

[An] error in capital punishment occurs when we execute someone whose crime does not seem so aggravated when compared to those of many who escaped the death penalty. It is in this kind of case—which is extremely common—that we must worry whether, first, we have designed procedures which are appropriate to the decision between life and death and, second, whether we have followed those procedures.

Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L.F. 555, 576. In his dissenting opinion in *Pulley v. Harris*, 104 S. Ct. 871, 889 (1984), Justice Brennan quoted the above passage and noted that "[c]omparative proportionality review is aimed at eliminating this . . . type of error."

⁴⁶ In 1976, the Court approved three statutory capital sentencing schemes that required state appellate review of death sentences without addressing the question of whether the eighth amendment mandates such review. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). The Court's 1976 cases also rejected two statutory frameworks that lacked any requirement of state appellate review, again without addressing the eighth amendment issue. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana* (S. Roberts), 428 U.S. 325 (1976). In its strongest indication yet that the eighth amendment may require state appellate review of death sentences, the court in *Pulley v. Harris*, 104 S. Ct. 871, 877 (1984), noted that the plurality opinion in *Gregg* "suggested that some form of meaningful appellate review is required."

⁴⁷ See *Pulley*, 104 S. Ct. at 876.

particular, most statutes require comparative proportionality review,⁴⁸ which ensures that no person is executed without a prior determination that his punishment is not excessive when compared with sentences given offenders who committed similar crimes in that state.⁴⁹ Although proportionality review is an important check against capital sentencing errors, the Court recently held in *Pulley v. Harris*⁵⁰ that the eighth and fourteenth amendments do not require such review in capital cases.⁵¹

In addition to direct review of death sentences in state appellate courts, condemned persons may also seek collateral review in federal court through habeas corpus proceedings challenging unlawful state detentions.⁵² Despite the Court's earlier assertions that execution is a unique penalty entitling capital defendants to greater procedural protection than noncapital defendants, the Court has recently indicated an impatience with lengthy execution delays attributable to federal habeas corpus proceedings.⁵³ In *Barefoot v. Estelle*,⁵⁴ for example, the Court held that federal courts of appeals may adopt expedited procedures in death penalty cases to permit resolution of habeas corpus claims prior to the scheduled execution date.⁵⁵

Considered together, these cases illustrate how far the Court has strayed from the principles it espoused in *Furman* and its progeny. By tolerating death penalty statutes that provide greater capital sentencing discretion, while also restricting a condemned person's opportunity for meaningful appellate review, the Court has paved the way for procedural schemes that violate the eighth and fourteenth amendments' demand for fair and consistent capital sentencing decisions.

Part I of this Project⁵⁶ summarizes the major Supreme Court decisions leading to the emergence of a system of guided discretion in capital sentencing. Part II⁵⁷ discusses and evaluates more recent cases dealing with discretionary capital sentencing, criticizes the Court for tolerating schemes that provide only minimal guidance in capital sentencing, and argues that these schemes ignore the Court's earlier demand that sentencing discretion in capital cases be suitably guided and limited. Part III⁵⁸ assesses recent Supreme Court developments in the area of federal and state appellate review of capital sentencing. Because meaningful appellate review provides valuable protection against capital sentencing

⁴⁸ *Id.*

⁴⁹ See *infra* text accompanying notes 374, 379-86.

⁵⁰ 104 S. Ct. 871 (1984).

⁵¹ *Id.* at 881.

⁵² See *infra* notes 469-73 and accompanying text.

⁵³ See *infra* notes 494-96, 556-60 and accompanying text.

⁵⁴ 103 S. Ct. 3383, 3393-95 (1983).

⁵⁵ See *infra* notes 511-21 and accompanying text.

⁵⁶ See *infra* notes 63-188 and accompanying text.

⁵⁷ See *infra* notes 189-363 and accompanying text.

⁵⁸ See *infra* notes 364-566 and accompanying text.

errors that statutory sentencing guidelines cannot supply,⁵⁹ Part III concludes that two of the Court's most recent capital cases, *Barefoot v. Estelle*⁶⁰ and *Pulley v. Harris*,⁶¹ were wrongly decided. Finally, an appendix⁶² is included to provide a general description of capital punishment statutes currently in force.

I

THE EMERGENCE OF GUIDED DISCRETION IN CAPITAL CASES

A. Invalidating Unguided Discretion

The Supreme Court first considered the issue of unguided discretion in capital sentencing in a 1971 case, *McGautha v. California*.⁶³ The Court granted certiorari in *McGautha* to determine whether infliction of the death sentence by a jury without any governing standards constitutes a deprivation of life without due process of law in violation of the fourteenth amendment.⁶⁴ The petitioner argued that giving a jury unbridled discretion to inflict or withhold the death penalty as it sees fit is

⁵⁹ See *infra* note 427 and accompanying text.

⁶⁰ 103 S. Ct. 3383 (1983).

⁶¹ 104 S. Ct. 871 (1984).

⁶² See *infra* notes 579-754 and accompanying text.

⁶³ 402 U.S. 183 (1971). In *McGautha*, the petitioner and a co-felon were convicted of first degree murder committed during the course of an armed robbery. At a separate sentencing proceeding, the state presented evidence of McGautha's prior felony convictions, and the same jury which had rendered the guilty verdicts was given a choice between imposing either the death penalty or life imprisonment on each defendant. The jury was instructed that:

in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and absolute discretion. . . .

. . . .
 . . . [B]eyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter . . . [to the] absolute discretion of the jury.

McGautha, 402 U.S. at 189-90. The jury returned separate verdicts sentencing McGautha to death and his co-defendant, who had no prior criminal record, to life imprisonment.

⁶⁴ *McGautha v. California*, 70 Cal. 2d 770, 452 P.2d 650 (1969), *cert. granted*, 398 U.S. 936 (1970). *Crampton v. Ohio*, a second case presenting the same issue of standardless jury sentencing, was joined and decided with *McGautha*. See *McGautha*, 402 U.S. at 183 n*. The petitioner in *Crampton* also challenged his sentence on the ground that he had been convicted and sentenced to die in a unitary proceeding. The Court therefore granted certiorari to decide the second issue of whether the bifurcated proceedings provided for in states such as California are required in all capital cases. *Crampton v. Ohio*, 18 Ohio St. 2d 182, 248 N.E.2d 614 (1969), *cert. granted*, 398 U.S. 936 (1970). The petitioner in *Crampton* argued that a unitary proceeding violates the due process clause of the fourteenth amendment because a defendant who exercises his fifth amendment right against self-incrimination by not testifying is forced to forfeit any opportunity to speak on his own behalf concerning the sentencing decision. *McGautha*, 402 U.S. at 210-11. The principal advantage of a bifurcated system for capital defendants is that potentially self-incriminating testimony and certain prejudicial evidence such as prior criminal convictions may be excluded during the guilt determination

"fundamentally lawless."⁶⁵ In a six to three decision,⁶⁶ the Court rejected this argument, holding that standardless jury sentencing in capital cases does not offend the due process clause of the fourteenth amendment. In reaching this result, Justice Harlan, writing for the Court, assumed that legislatures are incapable of formulating standards for determining what factors justify imposition of the death penalty without knowing the particular circumstances of a given case.⁶⁷ Justice Harlan thus reasoned that it would be impossible to hold that standardless jury sentencing violates the fourteenth amendment.⁶⁸ He con-

stage; but if convicted, the defendant may then testify and present any mitigating evidence at the sentencing hearing.

The *McGautha* Court nevertheless upheld Crampton's death sentence, ruling that "[i]t may well be . . . that bifurcated trials . . . [are a] superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution . . . does not guarantee trial procedures that are the best of all worlds" *McGautha*, 402 U.S. at 221. See *Spencer v. Texas*, 385 U.S. 554 (1967) (affirming a death sentence imposed under a recidivist statute after a unitary trial at which evidence of defendant's past convictions was presented for sentencing purposes, but where the jury was instructed to disregard such evidence in assessing the defendant's guilt or innocence). Justice Douglas, dissenting in *McGautha*, argued that bifurcated proceedings should be constitutionally required in capital cases. *McGautha*, 402 U.S. at 229-48 (Douglas, J., dissenting); see *infra* note 66.

⁶⁵ *McGautha*, 402 U.S. at 196.

⁶⁶ Justice Harlan wrote the majority opinion, in which Chief Justice Burger and Justices Stewart, White, and Blackmun joined. Justice Black wrote a brief concurring opinion emphasizing that no rights expressly or impliedly guaranteed by the Constitution were denied by the California or Ohio procedures. *McGautha*, 402 U.S. at 225-26 (Black, J., concurring).

Justice Douglas, joined by Justices Brennan and Marshall, dissented on the ground that a unitary trial for guilt determination and capital sentencing violates the fourteenth amendment because of the tension a single proceeding creates between the defendant's fifth amendment right against self-incrimination and his fourteenth amendment right of procedural due process. *McGautha*, 402 U.S. at 226-30 (Douglas, J., dissenting); see *supra* note 64. Justice Brennan, joined by Justices Douglas and Marshall, wrote a separate opinion dissenting on the additional ground that standardless jury sentencing represents a "stark legislative abdication" of states' responsibility for establishing capital sentencing standards which violates fourteenth amendment due process because it allows for an "unguided, unbridled, unreviewable exercise of naked power." *McGautha*, 402 U.S. at 252 (Brennan, J., dissenting).

⁶⁷ 402 U.S. at 207-08. In arguing that the development of capital sentencing standards is beyond present human ability, see *infra* note 407 and accompanying text, Justice Harlan expressed the view that the American Law Institute's Model Penal Code capital sentencing formula, which provides the sentencing authority with lists of statutory aggravating and mitigating circumstances, see *supra* note 14, merely suggests some subjects for the jury to consider in its deliberations, but does not provide it with actual standards by which to make that decision. *McGautha*, 402 U.S. at 207. For a similar argument, see *infra* note 117.

In his dissenting opinion, Justice Brennan attacked the Court's assumption that "the legislatures of the 50 States are so devoid of wisdom and the power of rational thought that they are unable . . . to determine for themselves the criteria under which convicted capital felons should be chosen to live or die." *McGautha*, 402 U.S. at 249 (Brennan, J., dissenting).

⁶⁸ *McGautha*, 402 U.S. at 207. Although Justice Harlan's majority opinion contains broad dicta suggesting that standardless jury sentencing in capital cases is not "offensive to anything in the Constitution," *id.* (emphasis added), *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), makes clear that the holding in *McGautha* is strictly limited to fourteenth amendment analysis and that absolute discretion in capital sentencing violates the eighth and fourteenth amendments. See *infra* notes 94-96 and accompanying text.

cluded that the states are entitled to assume that capital jurors "will act with due regard for the consequences of their decision and will consider a variety of factors."⁶⁹

One year after its decision in *McGautha*, the Supreme Court in *Furman v. Georgia*⁷⁰ reached the issue of whether death sentences imposed by juries with absolute discretion violate the eighth amendment's ban against "cruel and unusual punishment."⁷¹ In a five to four *per curiam* decision with nine separate opinions,⁷² the Court invalidated the death sentences of a convicted murderer and two convicted rapists.⁷³ The *per curiam* opinion states simply that "the imposition and carrying out of the death penalty in [the three cases before the Court] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."⁷⁴

It is difficult to derive a constitutional standard from the decision because the five Justices who voted in *Furman* to strike down the Georgia

⁶⁹ *McGautha*, 402 U.S. at 208.

⁷⁰ 408 U.S. 238 (1972) (*per curiam*).

⁷¹ *Id.* For a comprehensive commentary and discussion of the arguments and decision in *Furman*, see M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973); L. STEVENS, DEATH PENALTY: THE CASE OF LIFE VS. DEATH IN THE UNITED STATES (1978).

⁷² Justices Douglas, Brennan, Stewart, White, and Marshall each filed separate concurring opinions. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist each filed separate dissenting opinions.

⁷³ The petitioner in *Furman* was tried and convicted of murder without a recommendation for mercy. Caught in the act of committing a house burglary, Furman fired a gunshot through a closed door, killing the owner of the home. *Furman v. State*, 225 Ga. 253, 254, 167 S.E.2d 628, 629 (1969). Furman was sentenced to death pursuant to GA. CODE ANN. § 26-1005 (Supp. 1971). The two other cases joined with and decided in *Furman* were *Jackson v. Georgia*, 225 Ga. 790, 171 S.E.2d 501 (1969), *rev'd sub nom.* *Furman v. Georgia*, 408 U.S. 238 (1972), in which a convicted rapist who held the pointed ends of scissors to his victim's throat was sentenced to death pursuant to GA. CODE ANN. § 26-1302 (Supp. 1971); and *Branch v. Texas*, 447 S.W.2d 932 (Tex. Crim. App. 1969), *rev'd sub nom.* *Furman v. Georgia*, 408 U.S. 238 (1972), in which a convicted rapist was sentenced to death pursuant to TEX. PENAL CODE, art. 1189 (1961).

⁷⁴ *Furman*, 408 U.S. at 239-40 (*per curiam*). For a commentary on the various tests employed by one or more of the five Justices who voted to reverse the death sentences in *Furman*, see Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia*, 25 STAN. L. REV. 62 (1972).

The two principal arguments articulated in *Furman* by the four dissenting Justices are based on separation of powers and *stare decisis*. A common theme expressed in all four opinions is that legislatures are supposed to represent the moral consensus of the people and that their "authority should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue." *Furman*, 408 U.S. at 410 (Blackmun, J., dissenting); *see id.* at 383-86, 403-05 (Burger, C.J., dissenting); *id.* at 418, 431-33, 442-43, 456, 458, 461-65 (Powell, J., dissenting); *id.* at 465-70 (Rehnquist, J., dissenting). Three dissenting opinions cite "an unbroken line of precedent," from the 1879 case of *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1879) to the 1971 case of *McGautha v. California*, 402 U.S. 183, 226 (1971), in which the constitutionality of capital punishment was accepted or assumed. *Furman*, 408 U.S. at 417, 421-27 (Powell, J., dissenting); *see id.* at 380-81, 399-400 (Burger, C.J., dissenting); *id.* at 407-08 (Blackmun, J., dissenting).

and Texas statutes could not agree on a basis for the judgment. Only two Justices in the *Furman* majority felt that capital punishment was inherently cruel and unusual.⁷⁵ Justice Brennan argued that capital punishment does "not comport with human dignity."⁷⁶ Justice Marshall believed that it was "an excessive and unnecessary punishment"⁷⁷ and that "the great mass of citizens would conclude on the basis of [empirical evidence] that the death penalty is immoral and therefore unconstitutional."⁷⁸ In addition, three of the concurring Justices emphasized the unique nature of capital punishment in our system of criminal justice. Justice Brennan stated in his concurrence: "Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity."⁷⁹

⁷⁵ *Furman*, 408 U.S. at 305 (Brennan, J., concurring); *id.* at 370 (Marshall, J., concurring); see Dike, *Capital Punishment in the United States, Part I: Observations on the Use and Interpretation of the Law*, 13 CRIM. JUST. ABSTRACTS 302 (1981).

⁷⁶ *Furman*, 408 U.S. at 270 (Brennan, J., concurring). Justice Brennan argued that four principles inherent in the cruel and unusual punishment clause may be combined to form a cumulative test for determining whether a particular punishment violates the eighth amendment:

If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

Id. at 282. Justice Brennan reasoned that the death penalty violates the first principle because of its "finality and enormity." *Id.* at 289. He concluded that capital punishment violates the second principle because its infliction is so rare that "it smacks of little more than a lottery system." *Id.* at 293. Capital punishment violates the third principle, according to Justice Brennan, because "[t]he objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals." *Id.* at 300. Finally, Justice Brennan argued that in light of the fact that only "a random few" actually are executed, there is no substantial reason to believe that the death penalty is a superior deterrent or better serves the purpose of retribution than does imprisonment. *Id.* at 300-05. For a discussion concerning the efficacy of the death penalty as a deterrent to violent crimes, see *infra* note 398.

⁷⁷ *Furman*, 408 U.S. at 358 (Marshall, J., concurring). After tracing the origins of the prohibition against "cruel and unusual" punishments and the history of capital punishment, Justice Marshall concluded that the death penalty is excessive and unnecessary primarily because, in his view, statistics and logic indicate that it is not a better deterrent than life imprisonment. *Id.* at 345-54. See *infra* note 398.

⁷⁸ *Furman*, 408 U.S. at 363 (Marshall, J., concurring). Justice Marshall concluded that capital punishment would shock the conscience and sense of justice of the people if they were better informed about its discriminatory use against blacks, men, and the poor, about evidence of its mistaken use against innocent defendants, and about its "deleterious effects" on the entire criminal justice system. *Id.* at 364-69. Commentators have dubbed the belief that the public would repudiate the death penalty if it were better informed about the discriminatory and mistaken application of the penalty as the "Marshall hypothesis." See, e.g., H. Bedau, *supra* note 3, at 66; Vidmar & Ellsworth, *Research on Attitudes Toward Capital Punishment*, reprinted in *THE DEATH PENALTY IN AMERICA* 68, 80-84 (H. Bedau 3d ed. 1982). For a discussion concerning racial discrimination in the imposition of the death penalty, see *infra* note 81.

⁷⁹ *Furman*, 408 U.S. at 290 (Brennan, J., concurring). In his concurring opinion, Justice Brennan spoke at length about the unique aspects of capital punishment:

Justices Douglas, Stewart, and White focused on impermissible procedures under which the death penalty was being inflicted. The Georgia and Texas statutes under review in *Furman* granted the sentencing authority complete discretion in determining whether a capital defendant should die or be imprisoned and failed to define any standards for making that determination.⁸⁰ Justice Douglas found that the uncontrolled discretion accorded to judges and juries by this system offended both the fourteenth amendment's equal protection clause and the eighth amendment's ban against cruel and unusual punishment because the resulting sentences were "pregnant with discrimination."⁸¹ Justice

Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction. No other punishment has been so continuously restricted. . . . And those States that still inflict death reserve it for the most heinous crimes. . . . This Court, too, almost always treats death cases as a class apart. . . .

The only explanation for the uniqueness of death is its extreme severity. . . . No other existing punishment is comparable to death in terms of physical and mental suffering. . . . "[T]he process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture. . . ."

. . . .
In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity. I would not hesitate to hold, on that ground alone, that death is today a "cruel and unusual" punishment, were it not that death is a punishment of longstanding usage and acceptance in this country.

Id. at 286-91 (quoting *People v. Anderson*, 6 Cal. 3d 628, 649, 493 P.2d 880, 894, 100 Cal. Rptr. 152, 166 (1972)); see also *infra* notes 396-98 and accompanying text; *Furman*, 408 U.S. at 346 (Marshall, J., concurring) ("Death is irrevocable. . . . Death, of course, makes rehabilitation impossible. . . . [D]eath has always been viewed as the ultimate sanction. . . ."). For a discussion of the principle that capital punishment is constitutionally different from other lawful punishments, see *supra* note 10 and accompanying text.

⁸⁰ The Georgia provision under which *Furman* was sentenced read in part:

The punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend, or if the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life. In the former case it is not discretionary with the judge; in the latter it is.

GA. CODE ANN. § 26-1005 (Supp. 1971). The separate Georgia provision under which Jackson was sentenced prescribed that "[t]he crime of rape shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment for life." GA. CODE ANN. § 26-1302 (Supp. 1971). The Texas provision under which Branch was sentenced provided simply: "A person guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five." TEX. PENAL CODE, art. 1189 (1961).

⁸¹ *Furman*, 408 U.S. at 257 (Douglas, J., concurring). Justice Douglas reasoned that: it is "cruel and unusual" to apply the death penalty — or any other penalty — selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.

Id. at 245. Justice Douglas emphasized that "these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredi-

Stewart noted that the petitioners in *Furman* were "among a capriciously selected random handful"⁸² to be sentenced to death and concluded that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence . . . so wantonly and so freakishly imposed."⁸³

ent not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." *Id.* at 256-57.

Capital punishment has been inflicted in vastly greater proportions on black defendants than on white defendants. The statistics presented to the Court in *Furman* revealed that unbridled discretion in capital sentencing produced racially skewed results. For example, Justice Marshall cited statistics demonstrating that out of 3,859 persons executed in the United States between 1930 and 1972, 1,751 were white and 2,066 were black. More revealing than this was that out of the 455 persons executed for rape, 405 were black and only 48 were white. *See Furman*, 408 U.S. at 364 (Marshall, J., concurring). From these statistics, Justice Marshall concluded that "[i]t is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that . . . there is evidence of racial discrimination." *Id.* at 364. Justice Stewart observed that "if any basis can be discerned for the selection of these few [defendants] to be sentenced to die, it is the constitutionally impermissible basis of race." *Id.* at 310 (Stewart, J., concurring).

Despite procedural safeguards adopted after *Furman*, which were designed to reduce arbitrariness and caprice in capital sentencing decisions, racial discrimination in the administration of capital punishment continues today. One study examining South Carolina's constitutionally approved death penalty statute found that "rather than being eliminated, discrimination and bias have simply taken more sophisticated forms." Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. LAW & CRIMINOLOGY 379, 379 (1982). The study found that although during the first 29 months following enactment of South Carolina's new death penalty statute prosecutors were significantly more likely to request the death penalty for whites than for blacks charged with aggravated murder, defendants charged with murdering whites were 3.2 times more likely to have prosecutors seek the death penalty than those charged with murdering blacks. *Id.* at 383-84. Moreover, prosecutors sought the death penalty nearly four times as often for blacks accused of murdering whites than for blacks accused of murdering other blacks; and prosecutors were only twice as likely to seek the death penalty for whites accused of murdering other whites than for whites accused of murdering blacks. *Id.* at 384-85. Jacoby and Paternoster concluded that "[d]iscrimination still appears to exist, but it now takes the form of a greater probability that prosecutors will seek the death penalty if the victim is white." *Id.* at 385. The South Carolina study also examined the death-qualified procedures for jury selection approved in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and concluded that these procedures "appear to produce juries biased towards both convictions and the death penalty and disproportionately exclude blacks from serving on capital juries." Jacoby & Paternoster, *supra*, at 387.

Similar findings have been recorded in other states. In September 1977, 94% of the 114 men on Florida's death row had killed only white victims, 2% had killed black and white victims, and 4% had killed only black victims. *See Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 458 (1981). As in South Carolina, the more blatant form of discrimination has largely been corrected: 67% of those on Florida's death row were black when *Furman* was decided, but that figure dropped to 40% in the eight and one half years after *Furman*. *Id.* at 464; *see also* Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade County, Florida 1973-1976*, 33 STAN. L. REV. 75, 77 (1980) (finding "no evidence of discrimination" but "evidence of both selectivity and arbitrariness" in capital punishment imposition); *The Death Penalty's Ugly Question*, N.Y. Times, Jan. 9, 1984, at A16, col. 1 (discussing study of capital punishment in Georgia demonstrating that between 1976 and 1980 the death penalty was imposed on 67 of the 773 convicted murderers of whites but on only 12 of the 11,345 murderers of blacks, a disparity of 8.7% to 1%).

⁸² *Furman*, 408 U.S. at 238, 309-10 (Stewart, J., concurring).

⁸³ *Id.* at 310. Justice Stewart emphasized this point by declaring that "[t]hese death

Adopting a similar position, Justice White concurred in the Court's judgment because he found the capital punishment statutes permitted the jury, "in its own discretion . . . [to] refuse to impose the death penalty no matter what the circumstances of the crime."⁸⁴ Justice White believed this delegation of sentencing authority created a situation in which the "the death penalty [was] exacted with great infrequency even for the most atrocious crimes and that there [was] no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not."⁸⁵

Despite the *Furman* majority's apparent inability to agree upon a common rationale for its decision,⁸⁶ the five concurring opinions together advance the principle that a basic lack of fairness and consistency in capital sentencing decisions cannot be constitutionally tolerated.⁸⁷ The essential constitutional infirmity of the Georgia and Texas statutes invalidated in *Furman* was that they left "trial juries free to sentence to death or to life without any standards or guidelines to help (or force) them to make rational and uniform sentencing choices."⁸⁸ Because every state with a death penalty, except Rhode Island,⁸⁹ accorded the sentencing authority absolute discretion in capital cases,⁹⁰ the practical effect of the decision was clear: capital punishment sentencing, as then administered, was unconstitutional. As Justice Powell noted in his dissenting opinion, "[t]he capital punishment laws of no less than 39 states [out of 40 permitting the death penalty] and the District of Columbia are nullified" by virtue of the Court's decision to strike down the two statutes before it.⁹¹

sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309; see *infra* text accompanying note 584. For criticism of this argument, see *infra* note 85.

⁸⁴ *Furman*, 408 U.S. at 314 (White, J., concurring).

⁸⁵ *Id.* at 313 (White, J., concurring). In his dissenting opinion, Chief Justice Burger criticized the argument made by both Justice Stewart and Justice White that the sentences in *Furman* were invalid because the death penalty is imposed so infrequently:

This [argument] suggests that capital punishment can be made to satisfy Eighth Amendment values if its rate of imposition is somehow multiplied; it seemingly follows that the flexible sentencing system created by the legislatures, and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand. The implications of this approach are mildly ironical.

Id. at 398 (Burger, C.J., dissenting). For the same criticism see Polsby, *supra* note 3, at 27.

⁸⁶ See *supra* note 72; *infra* note 99 and accompanying text.

⁸⁷ See *supra* note 9 and accompanying text.

⁸⁸ H. Bedau, *supra* note 3, at 249.

⁸⁹ See *infra* note 91 and accompanying text.

⁹⁰ See *supra* note 15 and accompanying text.

⁹¹ *Furman*, 408 U.S. at 417 (Powell, J., dissenting). Justice Powell pointed out that only Rhode Island's mandatory death sentence for murder by life term prisoners was not reached by the *Furman* decision. *Id.* at 417 n.2. Mandatory death sentences such as Rhode Island's later were held unconstitutional in *Roberts v. Louisiana* (H. Roberts), 431 U.S. 633 (1977). See *infra* text accompanying notes 105-07.

The decision in *Furman* implicitly overruled the Court's earlier decision in *McGautha*.⁹² As Justice Douglas noted, the same constitutional infirmity of the Georgia and Texas statutes invalidated in *Furman* also characterized the California statute upheld in *McGautha* one year earlier: under all three statutes, "[j]uries (or judges, as the case may be) have practically untrammelled discretion to let an accused live or insist that he die."⁹³ Justice Stewart attempted to distinguish the two cases on the ground that *McGautha* only considered the statutes' constitutionality under the fourteenth amendment's due process and equal protection clauses while *Furman* also considered their constitutionality under the eighth amendment's prohibition against cruel and unusual punishment.⁹⁴ He offered no rationale, however, for a principled distinction between the fourteenth amendment standard and the eighth amendment standard for reviewing a death sentence.⁹⁵ In his *Furman* dissent, Chief Justice Burger argued that "it would be disingenuous to suggest that today's ruling has done anything less than overrule *McGautha* in the guise of an Eighth Amendment adjudication."⁹⁶ The basic tension between the two decisions suggests strongly that any distinction was drawn "merely to evade an embarrassing precedent."⁹⁷

⁹² See D. PANNICK, JUDICIAL REVIEW OF THE DEATH PENALTY 95 (1982).

⁹³ *Furman*, 408 U.S. at 248 (Douglas, J., concurring). In a footnote Justice Douglas discussed the tension between *Furman* and *McGautha*:

[I]f the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty on petitioners because they are "among a capriciously selected random handful upon whom the sentence of death has in fact been imposed," . . . or because "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not," . . . then the Due Process Clause of the Fourteenth Amendment would render unconstitutional "capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and [that] provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice."

Furman, 408 U.S. at 248-49 n.11 (Douglas, J., concurring) (quoting *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); and *McGautha*, 402 U.S. at 248 (Brennan, J., dissenting)).

⁹⁴ *Id.* at 310 n.12 (Stewart, J., concurring).

⁹⁵ See D. PANNICK, *supra* note 92, at 38. Justice Powell argued that the test for determining whether the fourteenth amendment's due process requirement has been satisfied is "fundamentally identical" to the test for determining whether the eighth amendment's ban against cruel and unusual punishment has been violated. *Furman*, 408 U.S. at 422 n.4 (Powell, J., dissenting).

⁹⁶ *Furman*, 408 U.S. at 400 (Burger, C.J., dissenting).

⁹⁷ D. PANNICK, *supra* note 92, at 38. The Court's complete reversal on the issue of absolute discretion in capital sentencing in just 14 months was unprecedented in Supreme Court jurisprudence. Justice Harlan's departure from the Court on September 23, 1971, does not explain the *sub silentio* reversal of his majority opinion in *McGautha* because Justice Powell, who replaced Justice Harlan, dissented in *Furman*. The reversal is attributable to the changed votes of Justices Stewart and White, who voted to uphold the death penalty statutes considered by the Court in *McGautha*, but who voted to invalidate the laws reviewed in *Furman*. As one commentator noted, however, "[w]hy Justices Stewart and White found the due process arguments unconvincing in *McGautha* but persuasive in *Furman* is an unusual riddle." Polsby,

The splintered majority that decided *Furman*⁹⁸ provided legislatures considering new capital punishment statutes with little guidance.⁹⁹ As a result, state legislatures responded to the decision by following two opposite approaches.¹⁰⁰ Most states adopted a modified version of the Model Penal Code approach¹⁰¹ providing for a system of guided discretion in which the sentencing authority must consider certain statutorily defined aggravating and mitigating factors in determining whether or not to impose the death penalty. Other states adopted an approach that eliminated any possibility of arbitrary infliction of the death penalty by providing mandatory capital punishment for certain forms of murder.

On July 2, 1976, the Supreme Court handed down five major decisions in capital cases challenging the constitutionality of both of these

supra note 3, at 26. Several commentators have suggested that the two Justices may have changed their minds because of *Furman's* implications for those on death row. See B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 244, 247, 255; Polsby, *supra* note 3, at 26; Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1692 n.11 (1974). The *Furman* Court was keenly aware that upholding the Georgia and Texas statutes on eighth amendment grounds would remove the last constitutional obstacle to full-scale resumption of executions in the United States. See *supra* note 3. Justice Marshall openly acknowledged the influence of this factor:

Candor compels me to confess that I am not oblivious to the fact that this is truly a matter of life and death. Not only does it involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution. While this fact cannot affect our ultimate decision, it necessitates that the decision be free from any possibility of error.

Furman, 408 U.S. at 316 (Marshall, J., concurring). In his dissenting opinion, Justice Blackmun commented: "I trust the Court fully appreciates what it is doing when it decides these cases the way it does today. . . . No longer is capital punishment possible" 408 U.S. at 411 (Blackmun, J., dissenting). Justice Blackmun ended his dissent by criticizing the *Furman* Court for being influenced by legislative, rather than adjudicative, facts: "Although I personally may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end." *Id.* at 414.

⁹⁸ See *supra* note 72 and accompanying text.

⁹⁹ In his dissenting opinion in *Furman*, Chief Justice Burger made the following observation:

Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress.

Furman, 408 U.S. at 403 (Burger, C.J., dissenting). Soon after the five separate opinions in the *Furman* majority were handed down, one commentator suggested that the opinions "seemed almost deliberately calculated to make this judgment of dubious value as a precedent." Polsby, *supra* note 3, at 40.

¹⁰⁰ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., CAPITAL PUNISHMENT 1979, at 2 [hereinafter cited as 1979 STATISTICS]. For an analysis of state court interpretations of *Furman* and different legislative approaches to writing a valid post-*Furman* death penalty law, see Note, *supra* note 97.

¹⁰¹ J. GORECKI, *supra* note 3, at 15. For a description of the Model Penal Code approach, see *supra* note 14.

approaches. *Gregg v. Georgia*,¹⁰² *Proffitt v. Florida*,¹⁰³ and *Jurek v. Texas*¹⁰⁴ established that the death penalty is not per se cruel and unusual punishment within the meaning of the eighth amendment and held that the guided discretion approach satisfied that amendment's requirements. *Woodson v. North Carolina*¹⁰⁵ and *Roberts v. Louisiana (S. Roberts)*¹⁰⁶ established that mandatory death sentences for first-degree murder are impermissible under the eighth and fourteenth amendments.¹⁰⁷

B. Providing for Guided Discretion

Gregg, *Proffitt*, and *Jurek* were all decided by the same seven member majority, with Justices Brennan and Marshall dissenting in each case on the ground that the death penalty is inherently cruel and unusual. In all three cases, the defendants were convicted of murder in one proceeding and later sentenced to death in a separate proceeding in which the sentencing authority balanced aggravating and mitigating factors to determine whether the death penalty should be imposed.¹⁰⁸ In *Gregg*, the jury imposed the death sentence on a defendant convicted of armed robbery and the murder of two victims after it had found two of ten possible statutory aggravating circumstances. The aggravating factors were that the defendant had committed the murders during the course of armed robberies, and that he had committed them for pecuniary gain.¹⁰⁹ In *Proffitt*, the trial judge imposed the death sentence¹¹⁰ on a

¹⁰² 428 U.S. 153 (1976).

¹⁰³ 428 U.S. 242 (1976).

¹⁰⁴ 428 U.S. 262 (1976).

¹⁰⁵ 428 U.S. 280 (1976) (plurality opinion).

¹⁰⁶ 428 U.S. 325 (1976) (plurality opinion).

¹⁰⁷ In both *Woodson* and *S. Roberts*, the rule against mandatory death sentences was announced in plurality opinions. In *Roberts v. Louisiana (H. Roberts)*, 431 U.S. 633 (1977), five Justices joined in a per curiam opinion confirming the unconstitutionality of mandatory death sentences. See *infra* notes 137-41 and accompanying text.

¹⁰⁸ Under this bifurcated system, after guilt is determined, a separate proceeding is held in which the prosecution presents evidence of aggravating factors and the defense presents evidence of relevant mitigating circumstances. The sentencing authority then can weigh all the evidence to determine whether the particular facts of the case warrant leniency or justify execution. Bifurcation permits introduction of evidence relevant to sentencing which may have been inadmissible or voluntarily withheld, see *supra* note 64, in the trial. In *McGautha*, the Court held that bifurcated proceedings in capital cases are not constitutionally required. See *supra* note 64. Nevertheless, all states with an active death penalty law now provide for bifurcated proceedings. See *infra* note 643 and accompanying text.

¹⁰⁹ *Gregg*, 428 U.S. at 161. Under the Georgia statute, the sentencing authority must consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of [10] statutory aggravating circumstances which may be supported by the evidence . . ." GA. CODE ANN. § 17-10-30(b) (1982). The statute also provides that "[e]xcept in cases of treason or aircraft hijacking, unless at least one of the [enumerated] statutory aggravating circumstances [is found beyond a reasonable doubt], the death penalty shall not be imposed." GA. CODE ANN. § 17-10-30(c) (1982).

¹¹⁰ Under Florida procedure upheld in *Proffitt*, the same jury that returns a guilty verdict also sits in a second evidentiary proceeding and renders an advisory opinion concerning both the presence of any aggravating or mitigating circumstances and the appropriate penalty.

defendant convicted of murder after finding that the evidence supported none of the seven statutory mitigating circumstances¹¹¹ and the following four aggravating circumstances were present: (1) the murder was premeditated and occurred in the course of a felony (burglary); (2) the defendant had the propensity to kill; (3) the murder was especially heinous, atrocious, and cruel; and (4) the defendant knowingly created a great risk of serious bodily harm and death to many persons.¹¹² In *Jurek*, the trial judge imposed the death sentence on a defendant convicted of murder after the jury found that the murder was deliberate and that the defendant constituted a continuing threat to society because he was likely to commit future violent crimes.¹¹³

The plurality opinion in *Gregg*, written by Justice Stewart and joined by Justices Powell and Stevens,¹¹⁴ first concluded that capital punishment is not unconstitutional in all circumstances:

Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude . . . that the infliction of death as a punishment for murder is not without justification and thus is not constitutionally severe.

. . . [T]he death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.¹¹⁵

The trial judge then submits written findings upon which the sentence is based. *Proffitt*, 428 U.S. at 248-50.

¹¹¹ Unlike the Georgia statute upheld in *Gregg* which only listed statutory aggravating circumstances, the Florida statute also listed statutory mitigating circumstances. The seven mitigating factors were: (1) the defendant has no significant criminal record; (2) the defendant committed the crime while under extreme mental or emotional disturbance; (3) the victim participated in or consented to the criminal conduct; (4) the defendant was an accomplice to the capital felony of another person and his participation was relatively minor; (5) the defendant acted under extreme duress or substantial domination of another person; (6) the defendant lacked the capacity to understand the criminality of his conduct or to conform to the requirements of law; and (7) the defendant's age at the time of the crime. FLA. STAT. ANN. § 921.141(6)(a)-(g) (West Supp. 1983); see *Proffitt*, 428 U.S. at 248-29 n.6.

¹¹² *Proffitt*, 428 U.S. at 246-47.

¹¹³ *Jurek*, 428 U.S. at 267-68. The Texas sentencing scheme upheld in *Jurek* is explained *infra* at text accompanying notes 126-29.

¹¹⁴ Justice White, concurring in the judgment, filed a separate opinion that was joined in part by Chief Justice Burger and Justice Rehnquist. Justice Blackmun also concurred in the judgment and simply cited all four dissenting opinions in *Furman*. See *supra* note 74.

¹¹⁵ *Gregg*, 428 U.S. at 186-87 (Stewart, J., plurality opinion). Before announcing the Court's holding that capital punishment does not necessarily violate the eighth and fourteenth amendments, Justice Stewart explained that in *Furman*, the Court had not resolved the ultimate issue of the death penalty's per se constitutionality:

Four Justices [Burger, C.J.; Blackmun, J.; Powell, J.; and Rehnquist, J.] would have held that capital punishment is not unconstitutional *per se*; two Justices

The plurality in *Gregg* went on to hold that a procedure under which the death penalty is imposed only after the sentencing authority has considered a statutory list of aggravating circumstances does not violate the *Furman* mandate "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."¹¹⁶ Justice Stewart believed that by focusing the sentencing jury's attention on "the particularized nature of the crime and the particularized characteristics of the individual defendant," the new Georgia sentencing procedure ensured that capital punishment would not be "wantonly or

[Brennan, J.; and Marshall, J.] would have reached the opposite conclusion; and three Justices [Douglas, J.; Stewart, J.; and White, J.], while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed.

Id. at 169 (emphasis in original) (footnotes omitted). Although Justice Stewart did not contradict himself by voting to uphold the death sentences in *Gregg*, *Proffitt* and *Jurek* after having voted to strike down the death sentences in *Furman*, the tone of his plurality opinions in the 1976 cases changed dramatically from that of his concurring opinion in *Furman*, which had emphasized the rarity with which the death penalty was imposed. See *supra* note 83 and accompanying text. Echoing the dissenting opinions in *Furman*, see *supra* note 74, Justice Stewart wrote in *Gregg* that "while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators. . . . Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity." *Gregg*, 428 U.S. at 174-75 (Stewart, J., plurality opinion). Compare *Furman*, 408 U.S. at 384 (Burger, C.J., dissenting) ("the [presumed] validity of legislatively authorized punishments . . . narrowly confines the scope of judicial inquiry"). Justice Stewart also adopted the second predominant theme of the dissenting opinions in *Furman*, noting in *Gregg* that "[t]he Court on a number of occasions has both assumed and asserted the constitutionality of capital punishment." *Gregg*, 428 U.S. at 168. Compare *Furman*, 408 U.S. at 407 (Blackmun, J., dissenting) ("until today capital punishment was accepted and assumed [by the Court] as not unconstitutional"). Justice Stewart's shift in attitude between *Furman* and *Gregg* is also noted in Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1007 (1978) ("Justice Stewart, in *Furman*, adopted an activist adjudicatory attitude Then, in upholding the guided discretion death penalty statute in *Gregg*, [he] shifted his adjudicatory attitude to the opposite end of the spectrum."). Justice Stewart's change in tone in *Gregg* probably resulted from judicial notice of the effort of state legislatures to retain the death penalty despite *Furman*'s sweeping invalidation of nearly every capital punishment statute existing in 1972:

[It] is now evident that a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction.

The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. . . . [A]ll of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.

Gregg, 428 U.S. at 179-81 (Stewart, J., plurality opinion). According to Woodward and Armstrong's account, "[w]hen the states began passing new death penalty laws right after the 1972 *Furman* decision, Stewart realized that he had miscalculated." B. WOODWARD & S. ARMSTRONG, *supra* note 3, at 432-33. For a probing inquiry into the divergent perspectives of Justice Stewart and Justice White on capital punishment, see Palmer, *Two Perspectives on Structuring Discretion: Justices Stewart and White on the Death Penalty*, 70 J. CRIM. L. & CRIMINOLOGY 194 (1979).

¹¹⁶ *Gregg*, 428 U.S. at 189 (Stewart, J., plurality opinion).

freakishly" imposed.¹¹⁷ Finally, Justice Stewart praised the Georgia statute for requiring the sentencing authority to specify the factors which provided the basis of its sentencing decision.¹¹⁸ He believed this provision, coupled with a requirement that all capital sentences receive automatic review by the Georgia Supreme Court, ensures "meaningful appellate review," of death sentences and thus acts as "an important additional safeguard against arbitrariness and caprice."¹¹⁹

Both *Proffitt* and *Jurek* were decided on the same grounds as *Gregg*.¹²⁰ The basic difference between the Florida statute upheld in *Proffitt* and the Georgia statute upheld in *Gregg* was that in Florida the trial judge determined the sentence, while in Georgia that decision was made by a jury.¹²¹ The *Proffitt* plurality, in an opinion by Justice Stewart, recognized that jury sentencing "can perform an important societal function," but nevertheless concluded that it is not constitutionally required.¹²² Justice Stewart also rejected the petitioner's contention that the statutory aggravating and mitigating circumstances were so vague and so broad that virtually "any capital defendant becomes a

¹¹⁷ *Id.* at 206-07. Some commentators have argued that the statutory formulations upheld in *Gregg* and *Proffitt* do not ensure the fairness and consistency in the capital sentencing process required by *Furman*:

"A check list of factors relevant to augmenting or diminishing the severity of a sentence is not really a standard. The jury with no more than such a list is neither equipped nor instructed in how to weight the evidence thereunder—e.g. whether to give all the several circumstances equal weight, or if they are to weigh disproportionately, to determine which should carry the greater and which the lesser weight. . . . Merely to make explicit a set of factors relevant to sentencing is not sufficient to bring the sentences actually meted out under any uniform standard at all. It is wholly insufficient to provide for fairness in jury sentencing, which is precisely what introducing these factors for the jury's use is intended to obtain."

D. PANNICK, *supra* note 92, at 98 (quoting H. Bedau, *supra* note 3, at 27).

¹¹⁸ *Gregg*, 428 U.S. at 195 (Stewart, J., plurality opinion).

¹¹⁹ *Id.* at 198. The importance of meaningful appellate review to the holdings in *Gregg* and the four other capital punishment decisions with which it was announced is discussed at *infra* notes 414-27 and accompanying text.

¹²⁰ *Proffitt*, 428 U.S. at 242, 247 (Stewart, J., plurality opinion); *Jurek*, 428 U.S. at 262, 268 (Stewart, J., plurality opinion). The petitioners in *Gregg*, *Proffitt*, and *Jurek* all argued that the death penalty is cruel and unusual under any circumstances. Justice Stewart rejected this argument in *Proffitt* and *Jurek* by citing his plurality opinion in *Gregg*. The opinions in *Proffitt* and *Jurek* then examined the Florida and Texas statutes, and concluded that both frameworks sufficiently directed the jury's attention to the individual circumstances of the crime. See *infra* notes 122-24, 125-29 and accompanying text. For a criticism of this conclusion with respect to the Texas framework upheld in *Jurek*, see Crump, *Capital Murder: The Issues in Texas*, 14 HOUS. L. REV. 531 (1977).

¹²¹ *Proffitt*, 428 U.S. at 252 (Stewart, J., plurality opinion); see *Furman*, 408 U.S. at 310 n.12. A second difference was that the Florida law provided a list of statutory mitigating circumstances whereas the Georgia statute listed only specific aggravating circumstances. See *supra* note 111.

¹²² *Proffitt*, 428 U.S. at 252 (Stewart, J., plurality opinion). Justice Stewart argued that judicial sentencing would lead to even greater consistency in the imposition of the death penalty because a trial judge is more experienced in sentencing than a jury. *Id.*

candidate for the death penalty.'"¹²³ He concluded that the Florida guidelines "[a]s construed by the Supreme Court of Florida . . . are not impermissibly vague."¹²⁴

The sentencing scheme upheld in *Jurek* was significantly different from the Georgia and Florida laws considered in *Gregg* and *Proffitt*, because the sentencing authority in *Jurek* was not provided with a list of aggravating circumstances to be weighed against mitigating factors.¹²⁵ The Texas statute¹²⁶ instead provided that only five specific forms of murder—murder of a peace officer or a fireman, murder committed in the course of certain designated felonies,¹²⁷ murder for hire, murder committed by a prison inmate, and murder committed while escaping from a penal institution—constituted capital murder. If a defendant was convicted of capital murder, the statute required that a separate jury hear additional evidence to determine whether his act was deliberately intended to cause death, whether he was likely to commit future violent crimes, and whether his response to provocation, if any, was unreasonable.¹²⁸ If the jury made affirmative findings on all three ques-

¹²³ *Id.* at 255 (quoting Petitioner's Brief at 64). In particular, the petitioner argued that two of the aggravating circumstances authorizing imposition of the death penalty—the "especially heinous, atrocious, or cruel" nature of the crime and the fact that "[t]he defendant knowingly created a great risk of death to many persons"—were unconstitutionally vague. *Id.* (quoting FLA. STAT. ANN. § 921.141(5)(h), (c) (Supp. 1983)). A similar argument was also raised and rejected in *Gregg*. See *infra* note 124.

¹²⁴ *Proffitt*, 428 U.S. at 256 (Stewart, J., plurality opinion). In *Gregg*, the petitioner had attacked as unconstitutionally broad the statutory aggravating circumstance that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Gregg*, 428 U.S. at 201 (Stewart, J., plurality opinion) (quoting GA. CODE § 17-10-30(b)(7) (1982)). Although the Georgia courts had not had occasion to interpret the challenged provision, the *Gregg* plurality summarily dismissed petitioner's contention, stating that "there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Id.*

¹²⁵ For an argument that the Texas framework upheld in *Jurek* constitutes a mandatory capital sentencing scheme in the absence of judicial interpretation, see *infra* note 129.

¹²⁶ TEX. PENAL CODE ANN. § 19.03 (Vernon 1974); see *Jurek*, 428 U.S. at 262, 265-66 n.1. For an analysis of the Texas capital murder statute upheld in *Jurek*, see Crump, *supra* note 120.

¹²⁷ Under the Texas statute, murder constitutes a capital offense if committed in the course of "committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson." TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 1974).

¹²⁸ The Texas statute requires the court to submit three questions to the sentencing jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CRIM. PROC. CODE ANN. art. 37.071(b)(1)-(3) (Vernon Supp. 1981); see *Jurek*, 428 U.S. at 269 (Stewart, J., plurality opinion). Where there is no provocation, the first and second findings are sufficient to require execution. For the argument that this sentencing scheme constitutes a mandatory death sentence, see *infra* note 129.

tions, it was required to impose the death sentence. The plurality concluded that "in narrowing the categories of murders for which a death sentence may ever be imposed," the Texas formulation "serves much the same purpose" as the statutory aggravating circumstances present in *Gregg* and *Proffitt*.¹²⁹

C. Invalidating Mandatory Death Sentences

In *Woodson v. North Carolina*¹³⁰ and *Roberts v. Louisiana* (*S. Roberts*),¹³¹ the Supreme Court considered the constitutionality of the approach taken by a second group of states in response to the *Furman* decision. Under this approach, mandatory death sentences were imposed for capital murder. The Court divided five to four in both cases.¹³² The three-member plurality, again speaking through Justice Stewart, invalidated a North Carolina statute and a Louisiana statute of this type on the grounds that mandatory imposition of the death sentence conflicted with contemporary standards of decency¹³³ and "fail[ed] to provide a

¹²⁹ *Jurek*, 428 U.S. at 270. The plurality in *Jurek* concluded that by limiting the crime of capital murder to five specific forms of murder, see *supra* text accompanying notes 126-27, and then requiring a sentencing jury to make two and in some cases three findings in aggravation of the penalty, see *supra* note 128, the Texas scheme "essentially requires that one of five aggravating circumstances be found" before capital punishment can be imposed. *Jurek*, 428 U.S. at 273. Although Justice Stewart correctly viewed the Texas formulation as implicitly requiring one of five aggravating circumstances before a death sentence can be imposed, his conclusion that the Texas scheme "serves much the same purpose" as the statutes upheld in *Gregg* and *Proffitt* was incorrect. The two statutory frameworks differ in that the Georgia and Florida laws permit the sentencing authority to impose the death penalty upon the finding of a statutory aggravating circumstance, while the Texas statute requires the sentencing authority to impose the death sentence upon the finding of an aggravating circumstance. There is no room for sentencing discretion in the Texas statute as written: "If the jury finds that the State has prove[n] beyond a reasonable doubt that the answer to each of the three questions is yes, then the death sentence is imposed." *Jurek*, 428 U.S. at 269 (Stewart, J., plurality opinion) (emphasis added). On its face, the Texas sentencing scheme constitutes a mandatory death sentence for five types of murder if the defendant acted deliberately, if he is likely to commit future acts of violence, and if he responded to provocation, if any, in an unreasonable manner.

Justice Stewart's plurality opinion attempts to reconcile the result in *Jurek* with the decisions in *Woodson* and *S. Roberts* striking down mandatory death sentences, see *infra* notes 132-33 and accompanying text, by asserting that the Texas courts had interpreted the future dangerousness question to permit the defendant to "bring to the jury's attention whatever mitigating circumstances he may be able to show." *Jurek*, 428 U.S. at 272. One commentator concluded, however: "The Supreme Court should have struck down the Texas statute in *Jurek v. Texas*, thereby encouraging the Texas legislature to redraft their death penalty statute to bring it into line with the practice of the Texas courts." D. PANNICK, *supra* note 92, at 101.

¹³⁰ 428 U.S. 280 (1976) (plurality opinion).

¹³¹ 428 U.S. 325 (1976) (plurality opinion).

¹³² In both *Woodson* and *S. Roberts*, Justice Stewart again wrote the plurality opinion with Justices Powell and Stevens joining. Justices Brennan and Marshall concurred in the judgment of both cases, adhering to their conclusion in *Furman* that the death penalty is per se unconstitutional under the eighth and fourteenth amendments. Chief Justice Burger and Justices White and Rehnquist dissented in both cases. Justice Blackmun also dissented, citing his dissenting opinion in *Furman*.

¹³³ *Woodson*, 428 U.S. at 301; *S. Roberts*, 428 U.S. at 332-33. "The history of mandatory

constitutionally tolerable response to *Furman's* rejection of unbridled jury discretion in the imposition of capital sentences."¹³⁴ Justice Stewart argued that instead of rationalizing the sentencing process, a mandatory sentencing scheme results in "blind infliction of the penalty of death."¹³⁵ He concluded that a mandatory death sentence is inconsistent with "the fundamental respect for humanity underlying the Eighth Amendment" because it does not permit individual consideration of the circumstances of a crime or the character of the defendant.¹³⁶

The Court considered the issue of mandatory death sentences a second time in *Roberts v. Louisiana (H. Roberts)*¹³⁷ in 1977. *Woodson* and *S. Roberts* had failed to establish a constitutional rule prohibiting all mandatory death sentences because Justices Brennan and Marshall filed separate concurring opinions in which they concluded that capital punishment is inherently cruel and unusual and therefore unconstitutional in every case.¹³⁸ In *H. Roberts*, the petitioner challenged a law requiring capital punishment for the murder of a police officer engaged in the performance of his lawful duties.¹³⁹ In this decision, Justices Brennan and Marshall joined the three members of the Court who had formed the plurality in *Woodson* and *S. Roberts*.¹⁴⁰ In a *per curiam* opinion, the five-member majority found the earlier *S. Roberts* case to be controlling:

As we emphasized repeatedly in [*S.*] *Roberts* and its companion cases decided last Term, it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow for consideration of particularized mitigating factors, it is unconstitutional.¹⁴¹

The decisions in *Woodson* and both *Roberts* cases made clear that states with mandatory capital punishment schemes would have to amend their death penalty statutes to provide for a system of guided discretion in

death penalty statutes in the United States . . . reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid." *Woodson*, 428 U.S. at 292-93.

¹³⁴ *Woodson*, 428 U.S. at 302.

¹³⁵ *Id.* at 304.

¹³⁶ *Id.* In *S. Roberts*, Justice Stewart wrote that "[t]he constitutional vice of mandatory death sentence statutes [is their] lack of focus on the circumstances of the particular offense and the character and propensities of the offender." *S. Roberts*, 428 U.S. at 333.

¹³⁷ 431 U.S. 633 (1977).

¹³⁸ Justices Brennan and Marshall first expressed this view in their respective concurring opinions in *Furman*. See *supra* note 75 and accompanying text.

¹³⁹ The statute defined first degree murder in part as "[w]hen the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a police officer who was engaged in the performance of his lawful duties." LA. REV. STAT. ANN. § 14:30(2) (West 1974).

¹⁴⁰ The other members of this majority included Justices Stewart, Powell, and Stevens.

¹⁴¹ *H. Roberts*, 431 U.S. at 637 (*per curiam*) (footnotes omitted).

capital sentencing proceedings.¹⁴²

D. A Constitutional Requirement of Guided Discretion

Following its inconclusive decision in *Furman v. Georgia*,¹⁴³ the Supreme Court could have pursued a variety of courses in subsequent capital punishment cases without undermining the *Furman* principle that affording absolute sentencing discretion to the sentencing authority in capital cases offends the eighth and fourteenth amendments.¹⁴⁴ The five cases¹⁴⁵ announced on July 2, 1976, revealed the Court's post-*Furman* approach in capital sentencing matters. In those decisions, the Court held that the eighth and fourteenth amendments permit the death penalty to be imposed only under a system of guided discretion, which neither grants the sentencing authority absolute discretion nor prohibits it from exercising any discretion in determining the sentence.¹⁴⁶ Although the Court did not explain how much sentencing dis-

¹⁴² See 1979 STATISTICS, *supra* note 100, at 2.

¹⁴³ See *supra* notes 72, 99 and accompanying text.

¹⁴⁴ The Court could have abolished capital punishment in the United States by concluding that although the *Furman* Court did not decide the ultimate issue of the death penalty's constitutionality, see *supra* note 115, execution is in fact inherently a cruel and unusual punishment. Some commentators thought that *Furman* had signaled an end to capital punishment in the United States. See Gardner, *Capital Punishment: The Philosophers and the Court*, 29 SYRACUSE L. REV. 1175, 1176 (1978); Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VAND. L. REV. 1005, 1005-06 (1977). For a post-*Furman*, pre-*Gregg* discussion and argument that the death penalty is per se cruel and unusual, see Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355 (1973).

A second conclusion the Court could have reached after *Furman* is that discretionary death sentences are inherently cruel and unusual, but that mandatory sentencing schemes are constitutional because they eliminate any possibility of the arbitrariness and caprice permitted by pre-*Furman* sentencing procedures. Third, the Court could have decided that both mandatory death sentences and guided discretion sentencing procedures are constitutionally permissible because neither method leaves the sentencing decision to the absolute discretion of a judge or jury.

¹⁴⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Roberts v. Louisiana* (S. Roberts), 428 U.S. 325 (1976) (plurality opinion).

¹⁴⁶ "After these five cases," wrote one commentator, "both poles on the jury discretion continuum resulted in unconstitutional sentences. 'Unfettered' discretion was unconstitutional, while no discretion—mandatory sentence of death legislatively prescribed for certain crimes—was also unconstitutional." Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1149 (1980) (footnotes omitted). Although the 1976 cases are not inconsistent with the judgment in *Furman*, the Court's attitude toward capital punishment seemed to change in the years between *Furman* and *Gregg*. In *Furman*, a majority of the Court was willing to go beyond the ordinary bounds of judicial restraint, and effectively declare that the legislatures of 39 states had enacted penalty statutes that were cruel and unusual in their operation. In *Gregg*, however, "[c]onsiderations of federalism, as well as respect for the ability of the . . . legislature[s]," was the predominant theme. *Gregg*, 428 U.S. at 186 (Stewart, J., plurality opinion); see *supra* text accompanying note 115. This change of attitude supports the view of some commentators that "[t]he retreat from *Furman* began with the 1976 death cases." Gillers, *supra* note 5, at 99. While some commentators have tried to explain the result in *Furman* by the Court's recognition that the lives of 600 condemned per-

cretion is permitted or required in capital cases, the Georgia, Florida, and Texas statutes upheld in *Gregg*, *Proffitt*, and *Jurek*¹⁴⁷ finally provided state legislatures with three models of a valid death penalty law.¹⁴⁸ Less than seven months after the Court cleared the way for executions to resume, a convicted murderer in Utah became the first person to be put to death in the United States in over ten years.¹⁴⁹

E. Allowing Increased Discretion as to Mitigating Circumstances

In 1978 the Supreme Court in *Lockett v. Ohio*¹⁵⁰ began to define the degree of capital sentencing discretion allowable under the eighth and fourteenth amendments. The Court's decision in *Lockett* was based on the specific concern it had expressed in *H. Roberts* that a capital sentencing authority should not be precluded from considering any mitigating

sons hinged on the resolution of the eighth amendment issue, see *supra* note 97, the result in *Gregg* is best explained by the Court's awareness that both state legislators and the general public felt that execution was an acceptable criminal punishment. See *supra* notes 8 & 115. This rationale for upholding the death penalty is ironically consistent with Justice Marshall's observation in *Furman*:

Perhaps the most important principle in analyzing "cruel and unusual" punishment questions is one that is reiterated again and again in the prior opinions of the Court: *i.e.*, the cruel and unusual language "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Furman, 408 U.S. at 329 (Marshall, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that penalty of expatriation for wartime desertion was cruel and unusual punishment)). In concluding that capital punishment violates the eighth amendment, however, Justice Marshall reasoned in *Furman* that the utility of a public opinion poll "cannot be very great" because "American citizens know almost nothing about capital punishment," and if they did, "the great mass of citizens would conclude on the basis of [available empirical evidence] that the death penalty is immoral and therefore unconstitutional." *Furman*, 408 U.S. at 361-63; see *supra* note 78.

¹⁴⁷ As one commentator put it:

The Court, in *Gregg* and its companion cases, did not address in any systematic way what principles would govern drawing the line, or delineate the allowable space on the continuum between the amount of sentencing discretion required in order to save execution from being unconstitutionally cruel and the amount of sentencing discretion which itself renders execution unconstitutionally cruel.

Radin, *supra* note 146, at 1149 (emphasis in original).

¹⁴⁸ Two weeks after the decisions in *Gregg*, *Proffitt*, and *Jurek* were announced, the Executive Committee of the Southern Legislative Conference of the Council of State Governments "identified the death penalty topic as a priority issue for study and asked that a paper be prepared on state legislation which would meet the Supreme Court's new standards." H. SCHWAB, LEGISLATING A DEATH PENALTY at v (Jan. 1977). For a concise analysis of the Court's decisions in *Gregg*, *Proffitt*, and *Jurek* from a legislative planning perspective, see generally *id.*; see also Stotzky, *Capital Punishment*, 31 U. MIAAMI L. REV. 841 (1977) (discussing implications of *Gregg*, *Proffitt*, and *Jurek* for Florida death penalty legislation).

¹⁴⁹ Gary Gilmore, who had publicly urged state authorities to carry out his death sentence, was executed by a firing squad on January 17, 1977. For an outline of some of the events surrounding Gilmore's execution, see Stotzky, *supra* note 148, at 35 n.1.

¹⁵⁰ 438 U.S. 586 (1978) (plurality opinion).

circumstances.¹⁵¹ The statute in *Lockett*¹⁵² required the sentencing judge to impose the death sentence for aggravated murder¹⁵³ unless at least one of only three specific statutory mitigating circumstances was established by a preponderance of the evidence.¹⁵⁴ This formulation foreclosed consideration of other mitigating factors. The petitioner in *Lockett* had participated in an armed robbery in which her co-participant accidentally shot a store owner to death while the petitioner waited in a getaway car.¹⁵⁵ The petitioner argued that her capital sentence was unconstitutional because the statute did not permit the sentencing authority to consider her "character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime" as mitigating factors.¹⁵⁶ In a plurality opinion,¹⁵⁷ Chief Justice Burger concluded that the Ohio law failed to "permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases."¹⁵⁸ The Chief Justice went on to state that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."¹⁵⁹ Although this broad language appeared in a plurality opinion, state legislatures responded to it in 1978 and 1979 by

¹⁵¹ See *supra* note 141 and accompanying text.

¹⁵² OHIO REV. CODE ANN. §§ 2929.03-.04 (Page 1975) (amended version at OHIO REV. CODE ANN. §§ 2929.03-.04 (Page 1982)).

¹⁵³ The statute required proof of at least one of seven aggravating circumstances to impose a death sentence. The statutory aggravating circumstances were: (1) assassination of an elected official or a candidate for public office; (2) murder for hire; (3) murder committed to effectuate an escape from criminal prosecution or incarceration; (4) murder by a prisoner; (5) a prior murder conviction or multiple killings (or multiple attempted killings) in the same case; (6) the victim was a law enforcement officer; or (7) the murder was committed in the course of a kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary. *Id.*; see *Lockett*, 438 U.S. at 611-12.

¹⁵⁴ The statutory mitigating circumstances defined by the Ohio statute challenged in *Lockett* were: (1) the victim induced or facilitated the offense; (2) the defendant acted under duress, coercion, or strong provocation; or (3) the defendant's conduct resulted primarily from the defendant's psychosis or mental deficiency. OHIO REV. CODE ANN. § 2929.04 (Page 1975) (amended version at OHIO REV. CODE ANN. § 2929.04 (Page 1982)); see *Lockett*, 438 U.S. at 612.

¹⁵⁵ *Lockett*, 438 U.S. at 590.

¹⁵⁶ *Id.* at 597.

¹⁵⁷ Justices Stewart, White, Blackmun, Powell, Rehnquist, and Stevens joined Parts I and II of the Chief Justice's opinion. Only Justices Stewart, Powell, and Stevens joined Part III of his opinion, which announced the judgment of the Court. *Lockett*, 438 U.S. at 597 (plurality opinion). Justices Blackmun, *id.* at 613, Marshall, *id.* at 619, and White, *id.* at 621, concurred in the judgment.

¹⁵⁸ *Id.* at 606 (plurality opinion).

¹⁵⁹ *Id.* at 608. Justice Blackmun would have limited the ruling to a constitutional requirement that a lack of specific intent to kill and a limited role in the commission of the offense may not be excluded from consideration as mitigating factors. *Id.* at 615-16 (Blackmun, J., concurring in the judgment). Justice White concurred in the judgment on the narrow ground that it is cruel and unusual to impose the death penalty where the defendant did not specifically intend to cause the death of the victim. *Id.* at 624-25 (White, J., concurring in the judgment).

rewriting laws limiting the mitigating circumstances a sentencing authority could consider in capital cases to allow consideration of "every possible mitigating factor."¹⁶⁰

In *Eddings v. Oklahoma*¹⁶¹ a majority of the Court confirmed that the Constitution requires that states allow the sentencing authority in capital cases to consider any mitigating factor offered by the defense.¹⁶² Eddings, then sixteen years old, shot and killed a police officer who had stopped his car because of a traffic violation.¹⁶³ The trial court found Eddings guilty of first degree murder upon his plea of nolo contendere.¹⁶⁴ After a separate sentencing proceeding,¹⁶⁵ the trial judge concluded that the state had proved three statutory aggravating circumstances: first, that the murder was especially "heinous, atrocious, and cruel;" second, that the crime was committed in order to avoid a lawful arrest; and third, that Eddings was a continuing threat to society.¹⁶⁶ The judge also found that the defendant's youth was a mitigating circumstance, but he refused as a matter of law to consider substantial mitigating evidence of the defendant's turbulent family history¹⁶⁷ and

¹⁶⁰ CAPITAL PUNISHMENT 1981, *supra* note 3, at 2-3.

¹⁶¹ 455 U.S. 104 (1982).

¹⁶² *Id.* at 113-17.

¹⁶³ *Id.* at 105-06. Eddings and several friends were attempting to run away from their homes when a police officer pulled them over after observing a momentary loss of control by the driver of their car. As the police officer approached the car, Eddings shot and killed him. *Id.*

¹⁶⁴ *Id.* at 106. The trial court permitted the state to try Eddings as an adult rather than as a juvenile because the trial judge found that Eddings was not amenable to rehabilitation. *Id.* The Oklahoma Court of Criminal Appeals affirmed the trial judge's ruling and the Supreme Court denied Eddings's certiorari petition on this issue. *In re M.E.*, 584 P.2d 1340 (Okla. Crim. App.), *cert. denied*, 436 U.S. 921 (1978).

¹⁶⁵ The Oklahoma death penalty statute required a separate sentencing proceeding for convicted capital offenders in which the prosecution could attempt to prove one or more of seven possible aggravating circumstances, *see infra* note 166, and the defense could present "evidence . . . as to any mitigating circumstances." *Eddings*, 455 U.S. at 106 (emphasis added by Court).

¹⁶⁶ 455 U.S. at 108 n.3. At the time of Eddings's trial, the Oklahoma death penalty statute recognized seven aggravating circumstances: (1) the defendant was previously convicted of a violent felony; (2) the defendant knowingly caused a risk of death to many persons; (3) the defendant was employed, or employed another, to commit the murder; (4) the murder was especially heinous, atrocious, or cruel; (5) the murder was committed in order to avoid arrest; (6) the defendant was serving a prison sentence for a felony conviction at the time of the murder; (7) it is probable that the defendant would commit future violent crimes and would thus constitute a continuing threat to society. *See* OKLA. STAT. ANN. tit. 21, § 701.12(1)-(7) (West 1980) (amended version at OKLA. STAT. ANN. tit. 21, § 701.12(1)-(8) (West 1983)).

After Eddings's trial, the Oklahoma legislature added an eighth statutory aggravating circumstance: "The victim of the murder was a peace officer . . . or [prison] guard . . . , and such person was killed while in performance of official duty." OKLA. STAT. ANN. tit. 21, § 701.12(8) (West 1983).

¹⁶⁷ *Eddings*, 455 U.S. at 109. Eddings presented substantial evidence of his unhappy upbringing. Eddings's parents were divorced when he was five years old, and he lived with his mother for nine years. During this time, Eddings's mother may have been a prostitute and an

his emotional disturbance.¹⁶⁸ The judge concluded that the three aggravating circumstances outweighed the single mitigating factor of youth and sentenced Eddings to death.¹⁶⁹ The Oklahoma Court of Criminal Appeals affirmed the sentence, concluding that "the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior."¹⁷⁰

The Supreme Court reversed in a five-to-four decision. The majority adopted the position advocated by Chief Justice Burger in his plurality opinion in *Lockett*, and held that the state court must "consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances."¹⁷¹ Justice Powell, writing for the Court, quoted from the Chief Justice's opinion in *Lockett*:

"[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."¹⁷²

The *Eddings* Court relied further on *Lockett*, stating that "the rule"¹⁷³ of

alcoholic. When she could no longer control him, Eddings's mother sent him to live with his father who was physically abusive toward the youth. *Id.* at 107.

¹⁶⁸ A state psychologist diagnosed Eddings as having a sociopathic or antisocial personality. *Id.* A psychiatrist testified at the sentencing hearing that Eddings did not appreciate the consequences of his actions. *Id.* at 108.

¹⁶⁹ After concluding that Eddings's youth did not outweigh the aggravating circumstances, the trial judge stated that in following the law he could not consider Eddings's violent background. *Id.* at 109.

¹⁷⁰ *Eddings v. State*, 616 P.2d 1159, 1170 (Okla. Crim. App. 1980). The Court of Criminal Appeals made three determinations as required by the Oklahoma death penalty statute. OKLA. STAT. ANN. tit. 21, § 701.13 (West 1983). First, the court found that the death sentence was not imposed "under the influence of passion, prejudice, or any other arbitrary factor." 616 P.2d at 1170 (quoting OKLA. STAT. ANN. tit. 21, § 701.13 (West 1983)). Second, the court determined that "the evidence does support the judge's finding of statutory aggravating circumstances." *Id.* Third, the court found that the death sentence was not "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.* The court also affirmed the trial judge's refusal to consider mitigating circumstances other than Eddings's youth. *Id.* at 1170.

In his dissent in *Eddings*, Chief Justice Burger argued that the record did not clearly indicate that the trial judge and the Court of Criminal Appeals excluded consideration of the mitigating evidence other than youth. The Chief Justice called the judge's statement "at best ambiguous." *Eddings*, 455 U.S. at 124 (Burger, C.J., dissenting). He commented that "there is no reason to read [the Court of Criminal Appeals'] statements as reflecting anything more than a conclusion that Eddings' background was not a sufficiently mitigating factor to tip the scales, given the aggravating circumstances." *Id.* at 125. For a brief summary of the Court of Criminal Appeals' decision in *Eddings*, see Recent Development, *Criminal Law: Oklahoma's Death Penalty Statutes Reviewed*, 33 OKLA. L. REV. 448 (1980).

¹⁷¹ *Eddings*, 455 U.S. at 117.

¹⁷² *Id.* at 110 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)) (emphasis in original). The Ohio statute held invalid in *Lockett* limited the mitigating circumstances which the sentencer could consider. See *supra* note 154 and accompanying text.

¹⁷³ In *Lockett*, only three other Justices joined the portion of the Chief Justice's opinion

the earlier decision "recognizes that a consistency produced by ignoring individual differences is a false consistency."¹⁷⁴ In applying the *Lockett* rule to *Eddings*, the Court asserted: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence."¹⁷⁵ The *Eddings* Court concluded that a youth's background and mental development should be considered, in addition to his chronological age, in determining the appropriate sentence.¹⁷⁶

Lockett and *Eddings* made clear that any mitigating factor offered into evidence by a capital offender must be considered by the sentencing authority.¹⁷⁷ Allowing the sentencing authority to consider any mitigating factor broadens its discretion to make decisions without guidance as to which factors constitute rational grounds for punishment. This increased discretion inherent in the *Lockett-Eddings* rule creates a tension with the Court's position in *Furman*.¹⁷⁸ In *Furman*, a majority of the Court concluded that overbroad sentencing discretion is cruel and unusual to those "random few" on whom the death penalty is inflicted.¹⁷⁹ By allowing the sentencing authority to rely on any factor to mitigate the sentence, the *Lockett-Eddings* rule opens the door to arbitrariness and caprice in withholding the death penalty. For example, an impermissible consideration such as race¹⁸⁰ may influence a sentencing authority's decisions such that the death penalty is inflicted upon one defendant of a disfavored race but not on a similarly situated defendant of a favored race. Yet the sentencing authority might be able to disguise its true

enunciating the rule that the sentencing authority must consider all mitigating circumstances. See *supra* note 157.

¹⁷⁴ *Eddings*, 455 U.S. at 112.

¹⁷⁵ *Id.* at 113-14 (emphasis in original).

¹⁷⁶ *Id.* at 116. In his dissent, Chief Justice Burger argued that neither state court clearly excluded consideration of mitigating circumstances other than *Eddings*'s youth. See *supra* note 170. Consequently, he believed that the lower courts had not violated the *Lockett* rule. *Eddings*, 455 U.S. at 126 (Burger, C.J., dissenting). The Chief Justice suggested that the Court should have decided the case solely on the grounds for which it had granted certiorari: to determine whether the eighth and fourteenth amendments prohibit the imposition of the death penalty on a 16 year old person. *Id.* at 120, 128. Instead, the majority's holding simply required sentencing authorities to consider youth as one mitigating factor and failed to provide a "blanket exemption" for juveniles. See Note, *Eddings v. Oklahoma: No Blanket Exemption Under the Eighth Amendment for Juveniles on Death Row*, 11 CAP. U.L. REV. 785, 804-08 (1982) [hereinafter cited as Note, *No Blanket Exemption*]; Note, *Juvenile Offenders and the Electric Chair: Cruel and Unusual Punishment or Firm Discipline for the Hopelessly Delinquent?*, 35 U. FLA. L. REV. 344, 364-66 (1983).

¹⁷⁷ See Note, *No Blanket Exemption*, *supra* note 176, at 806. For an analysis of the effect of the Supreme Court's decision in *Eddings* on Texas capital sentencing procedures, see Benson, *Texas Capital Sentencing Procedures after Eddings: Some Questions Regarding Constitutional Validity*, 23 S. TEX. L.J. 315, 323-31 (1982).

¹⁷⁸ See *infra* note 188.

¹⁷⁹ See *supra* notes 82-85 and accompanying text.

¹⁸⁰ Studies indicate that racial discrimination in various forms still exists in the imposition of the death penalty. See *supra* note 81.

racial motivations by pointing to some mitigating factor offered by the defendant of the favored race. Such a result clearly does not meet the standard of fairness and consistency in capital sentencing developed in *Furman* and its progeny.¹⁸¹

The *Lockett-Eddings* rule, however, reflects the Court's conclusion that the unique severity and finality of the death penalty¹⁸² require that a capital defendant be given every opportunity to avoid that sentence, even though the possibility of abuses of sentencing discretion is thereby increased.¹⁸³ Viewed in this way, the *Lockett-Eddings* rule can be reconciled with *Furman* and its progeny by distinguishing between the sentencing authority's "decision to impose a death sentence and the [sentencing authority's] decision to afford mercy."¹⁸⁴ The likelihood that a sentencing authority's decision to spare a defendant's life may be based on an impermissible reason disguised as a mitigating factor can be reduced by requiring nonexclusive lists of statutory mitigating circumstances.¹⁸⁵ A nonexclusive list of mitigating circumstances would focus the sentencing authority's attention on certain relevant factors to be considered in determining the appropriate sentence without limiting its

¹⁸¹ Other commentators have argued that *Lockett's* expansion of sentencing discretion increases the possibility of arbitrariness or caprice in capital sentencing decisions. See Radin, *supra* note 146, at 1153 ("To understand the significance of this decision [in *Lockett*] for the dilemma of discretion, recall that the level of individualization and the level of consistency must vary inversely. By requiring more individualization in capital murder cases after *Lockett*, the Court has necessarily increased the area of possible arbitrariness"). But see Gillers, *supra* note 5, at 30 (arguing that because mitigating factors represent rational grounds on which to determine the appropriate punishment, it cannot be arbitrary to show mercy towards defendants who present mitigating evidence).

¹⁸² See *supra* note 10 and accompanying text; *infra* text accompanying notes 393-402.

¹⁸³ See *Lockett*, 438 U.S. at 604 (plurality opinion) ("difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"). For a discussion of the principle that capital punishment is constitutionally different from other lawful punishments, see *supra* note 10 and accompanying text.

¹⁸⁴ Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317, 375 (1981).

¹⁸⁵ The *Lockett-Eddings* rule prohibits exclusive statutory lists of mitigating factors because the rule requires sentencing authorities to consider all proffered mitigating circumstances. After the plurality opinion in *Lockett*, states with exclusive lists of statutory circumstances amended their death penalty laws to permit the sentencing authority to consider any mitigating factor. See *supra* note 160. Today many capital punishment laws provide no guidance at all regarding mitigating factors. See *infra* notes 616-25 and accompanying text. A constitutional requirement of nonexclusive lists could harmonize the *Lockett-Eddings* rule with the requirement of *Furman* and its progeny that capital sentencing discretion be suitably directed and guided.

The Supreme Court recently denied certiorari in a case that raised the issues of whether the sentencer must be directed to weigh mitigating circumstances against aggravating circumstances and whether a statute that lists several aggravating circumstances but provides no specific mitigating circumstances is unconstitutional. *Conner v. Georgia*, 251 Ga. 113, 303 S.E.2d 266, cert. denied, 104 S. Ct. 203 (1983). The petitioner, however, did not raise the issue of whether some guidance as to mitigating factors is required until the petition for certiorari. Brief for Respondent in Opposition to the Petition for Certiorari at 16-17, *Conners v. Georgia*, 104 S. Ct. 203.

consideration of other factors. Comparative proportionality review in state courts also can serve as a check against unfair and inconsistent capital sentencing decisions.¹⁸⁶ Although most states provide for proportionality review, the Supreme Court has held that it is not constitutionally required.¹⁸⁷

The results in *Eddings* and *Lockett* are probably correct in light of the principle that the death penalty is constitutionally different from other sentences. Capital defendants should not be foreclosed from raising any factor or circumstance that may mitigate their sentence. The disturbing aspect of the *Lockett-Eddings* rule is, however, that it reflects the present Court's general willingness to allow increased discretion in capital sentencing decisions.¹⁸⁸ As the number of factors that the sentencing authority may consider increases, guided discretion becomes a more difficult goal to attain.

II

ABANDONING THE PURSUIT OF FAIRNESS AND CONSISTENCY IN CAPITAL SENTENCING

In 1972, *Furman v. Georgia*¹⁸⁹ established that the sentencing authority in capital cases could not be granted unbridled discretion in imposing the death sentence. In attempting to clarify the *Furman* mandate, the plurality in *Gregg v. Georgia*¹⁹⁰ acknowledged the unique gravity of sentencing deliberations involving the death penalty and the consequent need to require that sentencing discretion in such cases "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."¹⁹¹ State legislatures may direct and limit sentencing discretion by requiring the sentencing authority to consider certain statutory aggravating and mitigating circumstances relating to the nature of the crime and the character of the defendant. Under such a scheme, a death sentence can be imposed only if the sentencing authority finds at least one of the statutorily prescribed aggravating circumstances.¹⁹²

¹⁸⁶ Proportionality review considers whether the punishment in a particular case is excessive compared to sentences given other offenders who committed similar crimes in that state. See *infra* note 374 and accompanying text.

¹⁸⁷ See *Pulley v. Harris*, 104 S. Ct. 871, 879 (1984).

¹⁸⁸ According to a 1983 cover story in *Time* magazine:

Last January in *Eddings vs. Oklahoma*, . . . the Justices ruled that the judge or jury must consider any mitigating factor the convict claims. Yet to many observers, that sounds like a return toward uncontrollable discretion, the very flaw the court prohibited in 1972. Says former [Legal Defense Fund] Lawyer David Kendall: "We're right back to *Furman*."

An Eye for an Eye, TIME, Jan. 24, 1983, at 7.

¹⁸⁹ 408 U.S. 238 (1972); see *supra* notes 70-97 and accompanying text.

¹⁹⁰ 428 U.S. 153 (1976); see *supra* notes 108-19 and accompanying text.

¹⁹¹ *Gregg*, 428 U.S. at 189 (plurality opinion).

¹⁹² See, e.g., *supra* note 109 (explaining Georgia's capital punishment statute).

In *Lockett v. Ohio*¹⁹³ and *Eddings v. Oklahoma*,¹⁹⁴ the Supreme Court endorsed greater sentencing discretion than it had previously appeared willing to accept.¹⁹⁵ In both cases, the Court permitted increased discretion only in the sentencing authority's consideration of mitigating circumstances. *Lockett* and *Eddings* established the principle that a capital defendant is entitled to submit any evidence that might tend to mitigate his sentence. Three cases decided in 1983,¹⁹⁶ however, broaden sentencing discretion in the consideration of aggravating circumstances. Unlike *Lockett* and *Eddings*, these decisions afford the sentencer greater flexibility in imposing, rather than withholding, the penalty of death.

In *Zant v. Stephens*,¹⁹⁷ the Court upheld a death sentence imposed by a jury that had considered a constitutionally invalid aggravating circumstance in reaching its decision.¹⁹⁸ In so doing, the *Zant* Court endorsed the concept of threshold guidance. Once the sentencing authority has found one statutory aggravating circumstance, threshold guidance allows the sentencer virtually unbridled discretion to consider nonstatutory aggravating circumstances.¹⁹⁹ In a holding similar to that in *Zant*, the Court in *Barclay v. Florida*²⁰⁰ sustained a death sentence even though the sentencing judge had relied on an invalid aggravating circumstance.²⁰¹ *Barclay* also resolved an issue the Court expressly left open in *Zant*:²⁰² consideration of an invalid aggravating circumstance, along with valid aggravating circumstances, does not render the sentence invalid even where the capital sentencing statute explicitly calls for a weighing of aggravating and mitigating factors.²⁰³ In addition, the *Barclay* Court approved the trial judge's reliance on his own personal experiences in determining the appropriate punishment.²⁰⁴ Finally, in *California v. Ramos*,²⁰⁵ the Court upheld a death sentence despite a sentencing instruction by the trial court that introduced an extraneous circumstance—the possible commutation of a life sentence—for jury consideration.

Zant's endorsement of threshold guidance, and the Court's willingness in *Zant* and *Barclay* to allow consideration of invalid aggravating

193 438 U.S. 586 (1978); see *supra* notes 150-88 and accompanying text.

194 455 U.S. 104 (1982); see *supra* notes 161-88 and accompanying text.

195 See *supra* notes 177-88 and accompanying text.

196 *Zant v. Stephens*, 103 S. Ct. 2733 (1983); *Barclay v. Florida*, 103 S. Ct. 3418 (1983); *California v. Ramos*, 103 S. Ct. 3446 (1983).

197 103 S. Ct. 2733 (1983); see *infra* notes 208-78 and accompanying text.

198 103 S. Ct. at 2750.

199 *Id.* at 2742-44; see *infra* notes 218-33 and accompanying text.

200 103 S. Ct. 3418 (1983); see *infra* notes 279-334 and accompanying text.

201 103 S. Ct. at 3428.

202 See *Zant*, 103 S. Ct. at 2750.

203 See *Barclay*, 103 S. Ct. at 3426.

204 See *id.* at 3423-24.

205 103 S. Ct. 3446 (1983); see *infra* notes 335-63 and accompanying text.

circumstances, indicate the Court's increased tolerance of discretion in capital sentencing decisions. In *Zant* and *Barclay*, the Court upheld death sentences largely because the sentencing authority had found at least one valid aggravating circumstance in addition to an improper aggravating factor. By deferring to the sentencing authority's discretion in these cases, however, the Court disregarded the possibility that the sentencing authority might have rejected the death penalty but for its consideration of one or more improper aggravating factors.

The Court's willingness to allow consideration of invalid aggravating circumstances, and its approval in *Ramos* of instructions incorporating extraneous factors conflicts with the Court's insistence in *Gregg* that sentencing discretion be suitably directed and limited.²⁰⁶ Thus, these three cases constitute a substantial retreat from the standard of fairness and consistency established in *Furman* and *Gregg*.²⁰⁷

A. *Zant v. Stephens*

In *Zant*, the Court affirmed a death sentence although one of three aggravating circumstances relied on by the sentencing authority was subsequently declared unconstitutional by the Georgia Supreme Court. The *Zant* decision allows the sentencing authority to exercise unfettered discretion in capital cases once it has found at least one statutory aggravating circumstance. This result indicates that a statutory capital punishment scheme providing minimal control over sentencing discretion will survive constitutional scrutiny.

In *Zant*, a jury convicted Alpha Stephens of first degree murder committed during the course of a house burglary.²⁰⁸ In a separate sentencing proceeding,²⁰⁹ the jury found three statutory aggravating circumstances and sentenced Stephens to death.²¹⁰ While Stephens's appeal was pending, the Georgia Supreme Court held in *Arnold v. State*²¹¹ that one of the aggravating circumstances relied on by the jury

²⁰⁶ See *supra* notes 116-19 and accompanying text.

²⁰⁷ See *supra* notes 70-119 and accompanying text.

²⁰⁸ *Zant*, 103 S. Ct. at 2736. Prior to the murder, Stephens was serving time for several burglary convictions and awaiting trial for a previous escape. Stephens again escaped from prison and, during the following two days, committed a series of crimes. Roy Asbell interrupted Stephens while he was burglarizing the home of Asbell's son. Stephens and his accomplice beat and robbed Asbell, drove him away from the home, and killed him. *Id.*

²⁰⁹ For a description of the sentencing process in Georgia, see *supra* note 109.

²¹⁰ 103 S. Ct. at 2737-38. Although the parties agreed that the jury found three aggravating circumstances, the Court noted that the jury's findings could be viewed as encompassing two aggravating circumstances, the first of which rested on two grounds. *Id.* The jury found that: (1) "[t]he offense of Murder was committed by a person with a prior record of conviction for a capital felony," *id.* at 2737 n.3; (2) "[t]he offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions," *id.*; and (3) "[t]he offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer and place of lawful confinement," *id.*

²¹¹ 236 Ga. 534, 224 S.E.2d 386 (1976).

that sentenced Stephens—the defendant’s “substantial history of serious assaultive criminal convictions”²¹²—was unconstitutionally vague.²¹³

The *Arnold* decision thus left the validity of Stephens’s death sentence in question. On direct appeal, however, the Georgia Supreme Court found that the existence of the two additional valid aggravating circumstances in Stephens’s case adequately supported the jury’s imposition of the death sentence.²¹⁴ After a state and federal district court had rejected Stephens’s application for a writ of habeas corpus,²¹⁵ the United States Court of Appeals for the Fifth Circuit determined that a writ should be issued and set aside Stephens’s death sentence.²¹⁶ The

²¹² *Zant*, 103 S. Ct. at 2737 n.3.

²¹³ *Arnold*, 236 Ga. at 539-42, 224 S.E.2d at 391-92. In *Arnold*, the defendant was convicted for committing a murder during a liquor store robbery. *Id.* at 534-35, 224 S.E.2d at 388. The jury found as the single aggravating circumstance that the defendant had “a substantial history of serious assaultive criminal convictions.” *Id.* at 540, 224 S.E.2d at 391. The Georgia Supreme Court held that the statutory language, “substantial history,” as applied in death penalty cases, provided an inadequate guideline for triers of fact. According to the Court, a jury’s determination of “[w]hether the defendant’s [two prior convictions met] this legislative criterion [would be] highly subjective.” *Id.* at 541-42, 224 S.E.2d at 391-92. The court therefore held that this aggravating circumstance, as defined in the Georgia statute, was unconstitutional and set aside the death sentence. *Id.* at 542, 224 S.E.2d at 392.

²¹⁴ *Stephens v. State*, 237 Ga. 259, 261-62, 227 S.E.2d 261, 263, *cert. denied*, 429 U.S. 986 (1976). The Georgia Supreme Court distinguished *Stephens* from *Arnold*. “In *Arnold*, [the invalid aggravating circumstance] was the sole aggravating circumstance found by the jury. In this case, the evidence supports the jury’s findings of the other statutory aggravating circumstances, and consequently the sentence is not impaired.” *Stephens*, 237 Ga. at 261-62, 227 S.E.2d at 263.

²¹⁵ First, Stephens unsuccessfully petitioned for state habeas corpus relief. *See Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, *cert. denied*, 439 U.S. 991 (1978). Stephens then applied for a federal writ of habeas corpus. The federal district court denied Stephens’s petition, but the Fifth Circuit reversed. *See Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), *rev’d*, 103 S. Ct. 2733 (1983).

²¹⁶ In striking Stephens’s death sentence, the Fifth Circuit relied on the Supreme Court’s decision in *Stromberg v. California*, 283 U.S. 359 (1931). *Stephens v. Zant*, 631 F.2d at 406. *Stromberg* involved a conviction for displaying a red flag in violation of a California statute. 283 U.S. at 360-61. Under the statute, such a display was prohibited if motivated by any one of three enumerated purposes. *Id.* at 361. The Court held that the statutory proscription of one of the listed purposes was unconstitutional. *See id.* at 368-70. Moreover, given the jury’s general verdict, “it [was] impossible to say under which clause of the statute the conviction was obtained.” *Id.* at 368. Thus, “it [could] not be determined upon [the] record that the appellant was not convicted under [the invalid] clause [of the statute].” *Id.* The appellant’s conviction was therefore reversed. *See id.* at 370.

The Fifth Circuit in *Zant* similarly found that the invalid aggravating circumstance might have been operative in the jury’s imposition of the death sentence:

It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance. The jury had the authority to return a life sentence even if it found statutory aggravating circumstances. It is possible that even if the jurors believed that the other aggravating circumstances were established, they would not have recommended the death penalty but for the decision that the offense was committed by one having a substantial history of serious assaultive criminal convictions, an invalid ground.

631 F.2d at 406 (citations omitted). The Fifth Circuit therefore reversed the district court’s denial of habeas corpus relief. *See id.* at 407.

Supreme Court granted certiorari.²¹⁷

Before addressing the merits of the case, the Supreme Court certified the following question²¹⁸ to the Georgia Supreme Court: "What . . . premises of state law . . . support the conclusion that the death sentence in [*Zant* was] not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?"²¹⁹ In response, the Georgia high court indicated that it based its decision to affirm Stephens's death sentence in part on the role of statutory aggravating circumstances in the state's capital punishment scheme.²²⁰ According to the Georgia court, aggravating circumstances merely serve to establish the class of defendants on which the death penalty may be legitimately imposed; requiring a jury to find at least one statutory aggravating circumstance before imposing a death sentence serves to establish the eligible class.²²¹ After the death penalty becomes an option, however, "all the facts and circumstances of the case determine . . . whether or not . . . the death penalty is imposed."²²² In *Zant*, the Georgia court found that the record adequately supported imposition of the death penalty without reference to the invalid aggravating circumstances.²²³

The United States Supreme Court affirmed Stephens's death sentence,²²⁴ rejecting Stephens's argument that a capital sentencing scheme "that permits the jury to exercise unbridled discretion"²²⁵ once it finds at least one statutory aggravating circumstance violates the *Furman* mandate. "[T]hat argument could not be accepted," the Court

²¹⁷ The Court granted a petition for certiorari to Walter Zant, the warden of the prison where Stephens was held. *See Zant v. Stephens*, 454 U.S. 814 (1981).

²¹⁸ The Supreme Court certified a question pursuant to Georgia's statutory certification procedure. *See* GA. CODE § 15-2-9 (1982).

²¹⁹ *Zant v. Stephens*, 456 U.S. 410, 416-17 (1982).

²²⁰ *Zant v. Stephens*, 250 Ga. 97, 99-101, 297 S.E.2d 1, 3-4 (1982). The Georgia Supreme Court also responded that the death sentence should stand because *Stromberg v. California*, 283 U.S. 359 (1931), on which the Fifth Circuit relied in ruling favorably on Stephens's petition, *see supra* note 216, involved a general verdict and was thus not controlling. *See* 250 Ga. at 98, 297 S.E.2d at 2. In *Stromberg*, the jury could have relied entirely on the aggravating circumstance subsequently found invalid, *id.*, but the *Zant* jury "considered and found each [aggravating circumstance] on its own merits." *Id.* at 99, 297 S.E.2d at 3.

²²¹ 250 Ga. at 99-100, 297 S.E.2d at 3-4.

²²² *Id.* at 100, 297 S.E.2d at 4.

²²³ *Id.*

²²⁴ *Zant v. Stephens*, 103 S. Ct. 2733 (1983). Justice Stevens delivered the opinion of the Court, in which Chief Justice Burger, and Justices O'Connor, Powell, and Blackmun joined. Justice White filed an opinion concurring in part and concurring in the judgment. Justice Rehnquist filed a concurring opinion. Justice Marshall filed a dissenting opinion, in which Justice Brennan joined.

After the Supreme Court's decision in *Zant*, Georgia rescheduled Stephens's execution date for December 14, 1983. On December 13, 1983, the Supreme Court stayed Stephens's execution pending the decision of the United States Court of Appeals for the Eleventh Circuit in *Spencer v. Zant*. Stephens filed a second petition for certiorari on May 11, 1984. 53 U.S.L.W. 3010 (1984).

²²⁵ *Id.* at 2742.

reasoned, "without overruling our specific holding in *Gregg*."²²⁶ In *Gregg*, the Court upheld the constitutionality of Georgia's death penalty statute.²²⁷ The statute approved in *Gregg*, however, does not explicitly authorize the threshold guidance model of capital sentencing discussed by the Georgia Supreme Court in its response to the certified question.²²⁸ Nevertheless, the *Zant* Court found that *Gregg* approved the threshold model when it approved the Georgia statute.²²⁹

Although the *Zant* Court felt that statutory aggravating circumstances are essential to "circumscribe the class of persons eligible for the death penalty,"²³⁰ it nonetheless implied that a sentencing jury may exercise absolute discretion²³¹ once it finds one such circumstance. The Court merely added the proviso that the sentencing decision must be "an *individualized* determination [based on] the character of the individual and the circumstances of the crime."²³² The Court thus approved a statutory capital sentencing scheme in which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty."²³³

The Court also addressed the possibility that the invalid aggravating circumstance might have influenced the jury's decision.²³⁴ The

²²⁶ *Id.*

²²⁷ See *supra* notes 116-19 and accompanying text.

²²⁸ See GA. CODE § 17-10-30 (1982). Under Georgia law, the sentencing authority must consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of [Georgia's] statutory aggravating circumstances which may be supported by the evidence." *Id.* § 17-10-30(b). The Georgia statute requires a finding of at least one statutory aggravating circumstance to support a death sentence. *Id.* § 17-10-30(c). However, unlike the Georgia Supreme Court's threshold guidance theory, the Georgia sentencing statute does not differentiate between an eligibility stage, requiring a finding of one aggravating circumstance, and a decision stage, at which the sentencing authority exercises "absolute discretion," *Zant v. Stephens*, 250 Ga. 97, 99, 297 S.E.2d 1, 3 (1982), in reaching a decision.

²²⁹ See 103 S. Ct. at 2742 n.13.

²³⁰ *Id.* at 2743.

²³¹ *Id.* at 2742 n.13.

²³² *Id.* at 2744 (emphasis in original).

²³³ *Id.* at 2741.

²³⁴ *Id.* at 2747-49. The Court addressed a third issue in *Zant*: whether the Fifth Circuit's reliance on *Stromberg v. California*, 283 U.S. 359 (1931), see *supra* note 216, was proper, thus requiring an affirmation of the court of appeals's decision. According to the Court, *Stromberg* established two rules, neither of which required a reversal in *Zant*. See 103 S. Ct. at 2744-46. First, *Stromberg* requires "that a general verdict . . . be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of these grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Id.* at 2745. Because the jury in *Zant* "expressly found aggravating circumstances that were valid and legally sufficient to support the death penalty," the *Stromberg* rule did not require that the Court reverse *Stephens*'s death sentence. *Id.*

Stromberg also requires the reversal of a general verdict on a single-count indictment if the verdict rests on both a constitutional and an unconstitutional ground, "even if the defendant's [constitutionally] unprotected conduct, considered separately, would support the verdict." *Id.*

Court acknowledged that the trial judge's designation of the defendant's criminal record as a valid statutory aggravating circumstance in his charge to the jury "might have caused the jury to give somewhat greater weight to [Stephens's] prior criminal record that it otherwise would have given."²³⁵ Ultimately, however, the Court agreed with the Georgia Supreme Court that the designation had "an inconsequential impact on the jury's decision regarding the death penalty" because the trial judge had instructed the jury to consider all mitigating and aggravating circumstances in determining Stephens's sentence.²³⁶

The *Zant* Court identified two factors critical to its holding, and suggested that under different circumstances it might have set aside Stephens's death sentence. First, the Court noted that the evidence of a prior crime was clearly admissible apart from its role as a statutory aggravating circumstance.²³⁷ Georgia's sentencing statute expressly authorized the judge or jury to consider evidence "including the record of any prior criminal convictions."²³⁸ The Court concluded that the admission of evidence of prior crimes during the sentencing proceeding did not have the effect of authorizing the jury "to draw adverse inferences from conduct that is constitutionally protected;"²³⁹ nor did the evidence admitted involve "factors that are constitutionally impermissible or totally irrelevant to the sentencing process."²⁴⁰ Had the invalid aggravat-

at 2746. This rule applies, however, "only in cases in which the State has based its prosecution, at least in part, on a charge that constitutionally protected activity is unlawful." *Id.* In *Zant*, none of the aggravating circumstances considered by the jury involved constitutionally protected conduct; therefore, the second requirement from *Stromberg* was inapplicable in *Zant*. *Id.*

The Court's proper resolution of this issue does not overcome the infirmity of the *Zant* result. In order to rule as it did, the Court also had to find the level of sentencing discretion present in *Zant* consistent with *Furman* and its progeny. If the Court wrongly decided this discretion issue, its reversal of the court of appeals was improper.

²³⁵ See *id.* at 2749.

²³⁶ *Id.*

²³⁷ *Id.* at 2747.

²³⁸ *Id.* (emphasis omitted).

²³⁹ *Id.*

²⁴⁰ *Id.*

The Georgia statute permits counsel to introduce a wide range of evidence in the sentencing proceeding. The statute allows the judge or jury to "hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or nolo contendere of the defendant, or the absence of any prior conviction and pleas, provided that only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible." GA. CODE § 17-10-2(a) (1982). This mandate for the sentencing authority to consider a broad array of evidence is consistent with the *Gregg* Court's assertion that "it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (plurality opinion).

The courts are split on whether the ordinary rules of evidence apply in sentencing hearings. For a summary of how the states handle this problem, see *infra* notes 648-61 and accompanying text.

The Court in *Zant* suggested that a death sentence that may have been based in part on

ing circumstance consisted of evidence otherwise inadmissible, the jury's consideration of the invalid circumstance would destroy the reliability of the sentencing procedure and presumably invalidate the death sentence.²⁴¹

Second, the Court suggested that the result in *Zant* might differ if the state statute required the sentencing authority to weigh all statutory aggravating and mitigating circumstances in reaching its sentencing decision.²⁴² Georgia's sentencing statute places consideration of aggravating circumstances entirely within the sentencing authority's discretion, and does not require "that the presence of more than one aggravating circumstance should be given special weight."²⁴³ If a sentencing scheme required the sentencing authority to weigh all statutory factors, however, and the sentencing authority relied on both invalid and valid aggravating circumstances in reaching its decision, reviewing courts would be unable to ascertain the weight actually given the invalid factor. Thus, the subsequent invalidation of an aggravating circumstance in a statute that requires the sentencing authority to weigh all aggravating and mitigating circumstances might require reversal of a death sentence.

According to Justice Stevens's majority opinion, *Gregg* controlled the decision in *Zant* because "the Court approved Georgia's capital sen-

inadmissible evidence may be invalid. See 103 S. Ct. at 2747-48. Because the admissibility of evidence may thus be a critical factor in cases like *Zant*, the issue of which rules of evidence apply in sentencing hearings is important. For an argument that the ordinary rules of evidence should not apply to mitigating evidence, see Kaplan, *Evidence in Capital Cases*, 11 FLA. ST. U.L. REV. 369 (1983).

²⁴¹ 103 S. Ct. at 2750.

²⁴² *Id.* The Court expressly avoided a definitive ruling on the effect of post-sentencing invalidation of a statutory aggravating circumstance in jurisdictions that require the weighing of all statutory aggravating and mitigating circumstances:

[W]e note that in deciding this case we do not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty. . . . [T]he Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances, and Georgia has not adopted such a system.

Id. In *Barclay v. Florida*, 103 S. Ct. 3418 (1983), however, the Court held that the invalidation of a statutory aggravating circumstance in a jurisdiction that requires the weighing of all statutory factors would not nullify a death sentence. See *infra* notes 279-334 and accompanying text.

The Court's failure to specify a constitutionally mandated method for determining a sentence indicates a willingness to tolerate increased sentencing discretion. One commentator suggests that even though a single method of weighing aggravating and mitigating circumstances cannot be applied in all circumstances because of *Lockett's* "individual determination" requirement, the sentencing authority should be required to articulate the weighing method used in each case. See Note, *The Bitter Fruit of McGautha: Eddings v. Oklahoma and the Need for Weighing Method Articulation in Capital Sentencing*, 20 AM. CRIM. L. REV. 63, 97 (1982). Given the result in *Zant*, the Court does not seem likely to impose such a requirement on sentencing authorities.

²⁴³ *Zant*, 103 S. Ct. at 2750.

tencing statute [in *Gregg*] even though it clearly did not channel the jury's discretion by . . . guid[ing its] consideration of aggravating and mitigating circumstances."²⁴⁴ Justice Stevens's conclusion shows a lack of understanding of the Court's decision in *Gregg*.

Justice Stewart's plurality opinion in *Gregg* began its review of Georgia's sentencing scheme by clarifying the earlier decision in *Furman*.²⁴⁵ "It is quite simply," Justice Stewart observed "a hallmark of our legal system that juries be carefully and adequately guided in their deliberations."²⁴⁶ The *Furman* Court recognized that this principle is especially important in capital cases²⁴⁷ because of the unique nature of the death penalty.²⁴⁸ The *Gregg* plurality noted, however, that the concerns expressed in *Furman*, that the penalty of death not be imposed as a result of errors in the capital sentencing process,²⁴⁹ "can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."²⁵⁰ Justice Stewart's opinion concluded that capital sentencing discretion "must be suitably directed and limited so as to minimize the risk" of capital sentencing errors.²⁵¹

Because the Georgia statute provided the sentencing authority with a statutory list of aggravating circumstances for consideration in determining whether to impose or withhold the death sentence, the *Gregg* plurality felt that the Georgia framework "require[d] the jury to consider the circumstances of the crime and the criminal before . . . recommend[ing] sentence."²⁵² "As a result," Justice Stewart stated, "while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards.'"²⁵³ Therefore, the *Gregg* plurality upheld the Georgia sentencing scheme in part because it concluded that the sentencing authority's exercise of discretion was "always circumscribed by the legislative guidelines."²⁵⁴

²⁴⁴ *Id.* at 2742.

²⁴⁵ The Court's 1972 decision in *Furman* was decided by such a splintered majority, see *supra* note 98 and accompanying text, that it caused a great deal of confusion as to the constitutionality of capital punishment and capital sentencing procedures. See *supra* note 99 and accompanying text. The Court's 1976 decisions in *Gregg*, *Proffitt v. Florida*, 428 U.S. 242 (1976), *Jurek v. Texas*, 428 U.S. 262 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana* (S. Roberts), 428 U.S. 325 (1976), were the first Supreme Court cases interpreting *Furman*. See *supra* notes 102-49 and accompanying text.

²⁴⁶ *Gregg*, 428 U.S. at 193 (plurality opinion).

²⁴⁷ *Gregg*, 428 U.S. at 188 (plurality opinion).

²⁴⁸ See *supra* note 10; note 79 and accompanying text; *infra* notes 393-99 and accompanying text.

²⁴⁹ For an explanation of capital sentencing "errors," see *supra* notes 43-45 and accompanying text.

²⁵⁰ *Gregg*, 428 U.S. at 195 (plurality opinion).

²⁵¹ *Id.* at 189.

²⁵² *Id.* at 197.

²⁵³ *Id.* at 197-98 (quoting *Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)).

²⁵⁴ *Gregg*, 428 U.S. at 207 (plurality opinion). Justice Marshall's dissenting opinion in

The plurality in *Gregg* upheld the Georgia framework because it felt that the Georgia statute "suitably directed and limited" capital sentencing discretion by guiding the jury's decision with objective standards.²⁵⁵ The *Zant* Court nevertheless interpreted the result in *Gregg* as a "specific holding" endorsing the threshold theory.²⁵⁶ The Court in *Zant* thus upheld a capital sentencing scheme in which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion."²⁵⁷

The *Zant* majority's conclusion, that by upholding Georgia's capital punishment statute the *Gregg* Court upheld the threshold theory, is particularly perplexing given that the threshold concept is not mentioned in the Georgia statute.²⁵⁸ The threshold theory was unheard of until the Georgia Supreme Court's response to a certified question from the United States Supreme Court six years after *Gregg* was decided.²⁵⁹ The fact that the Supreme Court took the unusual step of certifying a question to the Georgia high court in *Zant* indicates the Court's confusion over the operation of the statute as interpreted by the Georgia courts.²⁶⁰ Notwithstanding its own initial confusion, the Court in *Zant* suggested that the *Gregg* Court understood the threshold theory and endorsed its use in upholding the Georgia statute.²⁶¹

The result in *Zant* is inconsistent not only with the plurality opinion in *Gregg*,²⁶² but also with the entire thrust of *Furman* and its progeny. "If this Court's decisions concerning the death penalty establish anything," wrote Justice Marshall in dissent, "it is that a capital sentencing scheme based on 'standardless jury discretion' violates the Eighth and Fourteenth Amendments."²⁶³ The *Zant* Court paid lip service to the "central mandate" of *Furman* and *Gregg*, that "discretion must be suitably di-

Zant elaborates on the way in which the *Gregg* Court interpreted the Georgia capital punishment statute. See *Zant*, 103 S. Ct. at 2762 (Marshall, J., dissenting).

²⁵⁵ *Gregg*, 428 U.S. at 189 (plurality opinion).

²⁵⁶ *Zant*, 103 S. Ct. at 2742.

²⁵⁷ *Id.* at 2741.

²⁵⁸ See *supra* note 228.

²⁵⁹ See *Zant*, 103 S. Ct. at 2757 (Marshall, J., dissenting) ("this 'threshold' theory . . . was invented for the first time by the Georgia Supreme Court more than seven years [after Stephens was sentenced]"). Georgia's high court may have developed the "threshold" theory as a means of distinguishing *Zant* from *Stromberg v. California*, 283 U.S. 359 (1931), a case the Fifth Circuit relied on in setting aside *Zant*'s death sentence. See *supra* note 216.

²⁶⁰ See 103 S. Ct. at 2762-63 (Marshall, J., dissenting) ("this Court . . . as recently as last Term found it necessary to ask the Georgia Supreme Court to clarify what the instructions in this case meant").

²⁶¹ See 103 S. Ct. at 2742-43 (majority opinion).

²⁶² In his dissenting opinion in *Zant*, Justice Marshall stated: "Today we learn for the first time that the Court did not mean what it said in *Gregg v. Georgia*. We now learn that the actual decision whether a defendant lives or dies may still be left to the unfettered discretion of the jury." *Id.* at 2760 (Marshall, J., dissenting).

²⁶³ *Id.* at 2757 (quoting *Gregg*, 428 U.S. at 195 n.47 (plurality opinion)).

rected and limited,"²⁶⁴ but refused to follow that standard.

According to the *Zant* Court's explanation of the threshold theory applied in Georgia,²⁶⁵ statutory aggravating circumstances merely narrow the class of convicted capital offenders who are eligible for the death penalty by screening out those cases in which none of the ten specified factors are present.²⁶⁶ Whenever the sentencing authority finds at least one statutory aggravating circumstance, "the 10 statutory factors . . . drop out of the picture entirely and play no part in the jury's decision whether to sentence the defendant to death."²⁶⁷ The *Zant* Court concluded that under this scheme, the submission of an invalid aggravating circumstance to the sentencing authority does not prejudice a defendant made eligible for the death penalty by the finding of at least one valid statutory aggravating circumstance because the statutory factors have no bearing on the ultimate sentencing decision once the threshold has been crossed.

Such a scheme poses difficulties because statutory aggravating circumstances, although originally designed to provide objective standards to guide the sentencing authority in its ultimate decision,²⁶⁸ do nothing to direct or limit discretion once the capital defendant becomes eligible for a death sentence. As Justice Marshall pointed out in his dissenting opinion, "[o]nce [the threshold] finding [of one statutory aggravating circumstance] is made, the jurors can be left completely at large, with nothing to guide them but their whims and prejudices."²⁶⁹

Thus, by embracing the threshold theory, the *Zant* decision allows virtually the same unbridled sentencing discretion in capital cases that the Court rejected in its landmark *Furman* decision.²⁷⁰ The level of discretion permitted in *Zant* differs from the absolute discretion of pre-*Furman* statutes only in that sentencing bodies must make a threshold finding before they can exercise their will.²⁷¹ As Justice Marshall pointed out, the decision in *Zant* "makes an absolute mockery of this Court's precedents concerning capital sentencing procedures."²⁷²

²⁶⁴ 103 S. Ct. at 2741 (majority opinion).

²⁶⁵ Justice Marshall argued that the Georgia Supreme Court's response to the certified question, in which it attempted to explain the role of statutory aggravating circumstances under the state statute, was far from clear. See 103 S. Ct. at 2758 n.1 (Marshall, J., dissenting).

²⁶⁶ *Id.* at 2758.

²⁶⁷ *Id.*

²⁶⁸ See *supra* note 14 and accompanying text.

²⁶⁹ 103 S. Ct. at 2760 (Marshall, J., dissenting).

²⁷⁰ The decision in *Furman* is discussed at notes 70-97 *supra* and accompanying text.

²⁷¹ See 103 S. Ct. at 2760 (Marshall, J., dissenting) ("The only difference between Georgia's pre-*Furman* capital sentencing scheme and the 'threshold' theory that the Court embraces today is that the unchecked discretion previously conferred in all cases of murder is now conferred in cases of murder with one statutory aggravating circumstance.")

²⁷² *Id.* The plurality's opinion in *Godfrey v. Georgia*, 446 U.S. 420 (1980), foreshadowed the Court's recent willingness to accept increased sentencing discretion. In *Godfrey*, the de-

Even assuming that the threshold theory is not inconsistent with the principles of *Furman* and *Gregg*, the jury's erroneous consideration of Stephens's prior criminal record as an aggravating circumstance may have influenced its decision to impose death. Although evidence of Stephens's prior criminal record was admissible at the sentencing stage,²⁷³ the trial judge's use of an unconstitutionally vague standard—that Stephens had “‘a substantial history of serious assaultive criminal convictions’”—improperly characterized Stephens's record as a statutory

fendant was sentenced to death for the shotgun killings of his wife and mother-in-law. *See id.* at 424-26. The jury found as a statutory aggravating circumstance that the murders were “outrageously or wantonly vile, horrible and inhuman.” *Id.* at 426. The plurality set aside the death sentences because the statutory aggravating circumstance, as applied, was unconstitutionally vague and thus failed to preclude the “arbitrary and capricious” sentencing prohibited by *Furman* and *Gregg*. “There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as ‘outrageously or wantonly vile, horrible, and inhuman.’” *Id.* at 428-29.

Although the immediate result in *Godfrey* limits sentencing discretion, the plurality opinion, read as a whole, could allow a disturbing expansion of discretion. The *Godfrey* plurality's opinion is consistent with the *Gregg* plurality's conclusion that the statutory aggravating circumstance was not unconstitutional on its face because the statute's language could be narrowly construed by the Georgia Supreme Court. *See id.* at 423. Moreover, the *Godfrey* plurality cited two decisions that demonstrated the ability and willingness of the Georgia court to keep the statutory aggravating circumstance “within constitutional bounds.” *See id.* at 429-31.

The fact that the constitutionality of an aggravating circumstance can depend upon the construction given it by a state supreme court clearly indicates the Court's willingness to tolerate increased sentencing discretion. A jury in a sentencing proceeding can impose the death sentence after receiving a broad instruction about an aggravating circumstance. If, on review, a state's highest court determines that the facts of the case meet an acceptable, narrow construction of the aggravating circumstance, the sentence may stand. Justice Marshall, in his concurrence in *Godfrey*, explained the limitless sentencing discretion that could result from the plurality's analysis:

To give the jury an instruction in the form of the bare words of the statute—words that are hopelessly ambiguous and could be understood to apply to any murder . . . —would effectively grant it unbridled discretion to impose the death penalty. Such a defect could not be cured by the *post hoc* narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

Id. at 437 (Marshall, J., concurring) (citations omitted). The narrowing function performed by the state's highest court controls sentencing discretion only in future cases. To circumscribe sentencing authority discretion in compliance with the mandate of *Furman* and its progeny, a reviewing court must reverse a death sentence imposed prior to the pronouncement of a narrowing construction.

Godfrey significantly augments the substantial sentencing discretion subsequently authorized in *Zant*. *Zant* permits a sentencing authority to impose the death penalty if at least one valid aggravating circumstance is found. In light of the Court's prior decision in *Godfrey*, that single aggravating circumstance may be stated in unconstitutionally broad language, provided the reviewing court subsequently determines that the facts of the case satisfy a sufficiently narrow construction of the aggravating circumstance.

²⁷³ *See* GA. CODE § 17-10-2(a), (c) (1982); *Zant*, 103 S. Ct. at 2747-48.

aggravating circumstance.²⁷⁴ Indeed, the *Zant* Court recognized that the "statutory" label "arguably might have caused the jury to give somewhat greater weight to respondent's prior criminal record than it otherwise would have given."²⁷⁵ The Court's ultimate conclusion, that this error did not amount to a constitutional defect,²⁷⁶ dismisses too easily the possibility that, but for the erroneous instruction, the jury would not have imposed the death sentence.²⁷⁷ By upholding Stephens's sentence, the *Zant* Court compromised fairness and disregarded its own assertion that "the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error."²⁷⁸

B. *Barclay v. Florida*

Elwood Barclay, a member of a group called the Black Liberation Army, was convicted of first degree murder by a Florida jury for the racially motivated slaying of a white man.²⁷⁹ In a separate proceeding, the jury issued an advisory sentence recommending life imprisonment.²⁸⁰ The trial judge disagreed and imposed the death sentence.²⁸¹

²⁷⁴ 103 S. Ct. at 2747.

²⁷⁵ *Id.* at 2749; see also *id.* at 2757 (Rehnquist, J., concurring) ("The fact that the instruction gave added weight to this no doubt played some role in the deliberations of some jurors.").

²⁷⁶ *Id.* at 2749 (majority opinion).

²⁷⁷ Although Georgia's death penalty statute does not require sentencing juries to accord greater weight to statutory aggravating circumstances than to nonstatutory aggravating factors, 103 S. Ct. at 2739-40, the statute may suggest this by requiring the jury to find at least one statutory aggravating circumstance as a prerequisite to imposing a death sentence. See GA. CODE § 17-10-30 (1982). More importantly, the trial judge's sentencing instruction did nothing to clarify this problem or indicate the method by which the jury was to apply the statute. See 103 S. Ct. at 2737 (quoting the trial judge's sentencing instruction).

²⁷⁸ 103 S. Ct. at 2747.

²⁷⁹ *Barclay v. Florida*, 103 S. Ct. 3418, 3420-21 (1983). On the evening of June 17, 1974, Barclay and three other members of the Black Liberation Army "set out in a car armed with a twenty two caliber pistol and a knife with the intent to kill . . . any white person that they came upon under such advantageous circumstances that they could murder him, her or them." *Barclay v. State*, 343 So. 2d 1266, 1267 (Fla. 1977), *cert. denied*, 439 U.S. 892 (1978), *reaff'd*, 411 So. 2d 1310 (Fla. 1981), *aff'd*, 103 S. Ct. 3418 (1983). After rejecting several possible victims because the circumstances were not opportune, Barclay and his companions picked up a white hitchhiker to serve as their victim. They took the man to a garbage dump where they repeatedly stabbed and shot him. After the killing, the group made tape recordings which they sent to the victim's mother and to radio and television stations. These recordings vividly described the murder and contained threats against the entire white community. *Id.* at 1268-69.

²⁸⁰ 103 S. Ct. at 3421. In most cases, the Florida death penalty statute requires that, after a person is convicted of first degree murder, a separate sentencing hearing be held before the convicting jury. See FLA. STAT. ANN. § 921.141(1) (West Supp. 1983). The jury renders an advisory sentence, *id.* § 921.141(2), that the judge may reject after making written findings of fact concerning aggravating and mitigating circumstances, *id.* § 921.141(3). The Supreme Court upheld the Florida death penalty statute in *Proffitt v. Florida*, 428 U.S. 242 (1976). See *supra* notes 120-24 and accompanying text.

²⁸¹ *Barclay*, 103 S. Ct. at 3421. Florida's use of advisory opinions by a jury that may be

As required by Florida law,²⁸² the trial judge issued written findings of fact concerning aggravating and mitigating circumstances.²⁸³ As statutory aggravating circumstances, he found that Barclay "had knowingly created a great risk of death to many persons, . . . had committed the murder while engaged in a kidnapping, . . . had endeavored to disrupt governmental functions and law enforcement, . . . and had been especially heinous, atrocious, and cruel."²⁸⁴

The judge found no statutory mitigating circumstances.²⁸⁵ In his written findings, the judge noted that Barclay had an extensive criminal record and therefore could not benefit from the Florida sentencing statute's stipulation that a lack of criminal activity serves as a mitigating circumstance.²⁸⁶ Indeed, the judge found that Barclay's criminal record constituted an aggravating factor,²⁸⁷ even though the Florida statute did not include the defendant's prior record as an aggravating circumstance and expressly prohibited consideration of nonstatutory aggravating circumstances.²⁸⁸ In addition, the judge compared Barclay's "racial hate murder"²⁸⁹ to the mass "racial and religious extermination" of the holocaust witnessed by the judge during his tour of duty as a soldier in World War II.²⁹⁰ This similarity, claimed the judge, supported his finding that Barclay's crime was "especially heinous."²⁹¹

rejected by the sentencing judge in capital cases was recently challenged and upheld in *Spaziano v. Florida*, 104 S. Ct. 3154 (1984).

²⁸² See FLA. STAT. ANN. § 921.141(3) (West Supp. 1983).

²⁸³ 103 S. Ct. at 3421.

²⁸⁴ *Id.* (citations omitted). The pertinent portions of the Florida sentencing statute relied on by the trial judge in finding these four aggravating circumstances are:

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of . . . any . . . kidnapping. . . .

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

FLA. STAT. ANN. § 921.141(5)(c), (d), (g), (h) (West Supp. 1983).

²⁸⁵ 103 S. Ct. at 3421.

²⁸⁶ *Id.*; see FLA. STAT. ANN. § 921.141(6)(a) (West Supp. 1983).

²⁸⁷ 103 S. Ct. at 3421.

²⁸⁸ 103 S. Ct. at 3427; see FLA. STAT. ANN. § 921.141(5) (West Supp. 1983). The Florida statute does not include the general category of "prior criminal activity" as an aggravating circumstance. It does, however, treat as aggravating circumstances a previous conviction for another capital or violent felony, see *id.* at § 921.141(5)(b), and the fact that the capital felony was committed by a person under sentence of imprisonment, see *id.* at § 921.141(5)(a).

²⁸⁹ *Barclay v. State*, 343 So. 2d 1266, 1267 (Fla. 1977), *cert. denied*, 439 U.S. 892 (1978), *reaff'd*, 411 So. 2d 1310 (Fla. 1981), *aff'd*, 103 S. Ct. 3418 (1983); see *supra* note 279.

²⁹⁰ See 103 S. Ct. at 3423 n.6.

²⁹¹ See *id.* at 3424 n.7. In support of his finding that the crime was particularly heinous, the judge gave the following written explanation:

The Florida Supreme Court affirmed the death sentence.²⁹² Although the trial judge's consideration of Barclay's criminal record as an aggravating circumstance was improper as a matter of state law,²⁹³ the Florida court apparently decided that this error was harmless.²⁹⁴

On certiorari before the United States Supreme Court, Barclay objected to his sentence on three grounds. First, he claimed that Florida law did not permit consideration of a defendant's prior criminal record as an aggravating circumstance.²⁹⁵ Second, Barclay argued that the judge's finding of four statutory aggravating circumstances was unsupported by the evidence.²⁹⁶ Finally, Barclay contended that the trial judge's reliance on his personal experiences in World War II constituted prejudicial error.²⁹⁷

The Supreme Court, in a plurality opinion by Justice Rehnquist,²⁹⁸ rejected all three of Barclay's contentions. Addressing Barclay's first objection, the Court upheld the death sentence despite the sentencing authority's consideration of an invalid aggravating circumstance,²⁹⁹ much

Because of [my] extensive experience, I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.

My experience with the sordid, tragic, and violent side of life has not been confined to the Courtroom. I, like so many American Combat Infantry Soldiers, walked the battlefields of Europe and saw the thousands of dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial and religious extermination.

To attempt to initiate such a race war in this country is too horrible to contemplate for both our black and white citizens. Such an attempt must be dealt with by just and swift legal process and[,] when justified by a Jury verdict of guilty [, we must] terminate and remove permanently from society those who would choose to initiate this diabolical course.

Having set forth my personal experiences above, it is understandable that I am not easily shocked or moved by tragedy—but this present murder and call for racial war is especially shocking and meets every definition of heinous, atrocious and cruel. The perpetrator thereby forfeits further right to life

Id.

²⁹² See *Barclay v. State*, 343 So. 2d 1266 (Fla. 1977), *cert. denied*, 439 U.S. 892 (1978), *reaff'd*, 411 So. 2d 1310 (Fla. 1981), *aff'd*, 103 S. Ct. 3418 (1983).

²⁹³ 103 S. Ct. at 3427.

²⁹⁴ See 434 So. 2d at 1270-71 (upholding Barclay's death sentence as appropriate, without specifically mentioning the trial judge's error in considering Barclay's criminal record as an aggravating circumstance); see also *infra* note 308 (explaining Florida's harmless error analysis as established in *Elledge v. State*, 346 So. 2d 998 (Fla. 1977)).

²⁹⁵ 103 S. Ct. at 3422.

²⁹⁶ *Id.* at 3422-23.

²⁹⁷ *Id.* at 3423-24.

²⁹⁸ Chief Justice Burger, Justice White, and Justice O'Connor joined Justice Rehnquist's opinion. *Id.* at 3420. Justice Stevens wrote a concurring opinion in which Justice Powell joined. *Id.* at 3428. Justice Marshall wrote a dissenting opinion in which Justice Brennan joined. *Id.* at 3437. Justice Blackmun also wrote a dissenting opinion. *Id.* at 3445.

²⁹⁹ *Id.* at 3428 (plurality opinion).

as it had in *Zant*.³⁰⁰ The plurality noted that the trial judge's consideration of Barclay's criminal record as an aggravating factor was improper as a matter of state law because the Florida sentencing statute prohibited the examination of nonstatutory aggravating circumstances.³⁰¹ The plurality observed, however, that the federal Constitution does not automatically forbid consideration of a capital defendant's criminal record as an aggravating circumstance. Thus, the issue before the Court was a narrow one: whether consideration of the defendant's criminal record as a nonstatutory aggravating circumstance was constitutionally permissible where the state sentencing statute expressly forbids examination of nonstatutory factors.³⁰² As the plurality noted: "[t]he crux of the issue, then, is whether the trial judge's consideration of this improper aggravating circumstance so infects the balancing process created by the Florida statute that it is constitutionally impermissible for . . . the sentence [to] stand."³⁰³

Justice Rehnquist's plurality opinion relied on *Proffitt v. Florida*³⁰⁴ to conclude that the trial court's consideration of nonstatutory aggravating circumstances³⁰⁵ did not offend the Constitution.³⁰⁶ Justice Rehnquist asserted that the *Proffitt* plurality "saw no constitutional defect in a sentence based on both statutory and nonstatutory aggravating circumstances."³⁰⁷

³⁰⁰ See *supra* notes 224-44 and accompanying text. Although the *Barclay* plurality reached a result similar to the holding in *Zant*, Justice Rehnquist's plurality opinion in *Barclay* distinguished between the invalid aggravating circumstances under review in the two cases. See *Barclay*, 103 S. Ct. at 3425 n.8 (plurality opinion). In *Zant*, the invalid aggravating circumstance was unconstitutionally vague. *Zant*, 103 S. Ct. at 2738. Thus, the Georgia legislature was constitutionally prohibited from including the invalid aggravating circumstance in its statutory scheme. In *Barclay*, however, there was no constitutional ground prohibiting Florida from incorporating the disputed aggravating circumstance in its statutory sentencing scheme. As Justice Rehnquist noted: "Barclay does not, and could not reasonably, contend that the United States Constitution forbids Florida from making the defendant's criminal record an aggravating circumstance." *Barclay*, 103 S. Ct. at 3425 n.8. Thus, although the Florida legislature had not chosen to include consideration of the defendant's criminal record as an aggravating circumstance, it was not constitutionally precluded from doing so.

³⁰¹ See 103 S. Ct. at 3427 (plurality opinion).

³⁰² See *id.* at 3427-28.

³⁰³ *Id.*

³⁰⁴ 428 U.S. 242 (1976).

³⁰⁵ The *Barclay* plurality recognized that the trial judge's examination of the defendant's prior criminal record constituted consideration of an invalid aggravating circumstance. See 103 S. Ct. at 3427 (plurality opinion). In addition, the trial judge's mention of his personal experiences in World War II, although cited in support of a finding that the defendant's behavior was "especially heinous," see *supra* notes 289-91 and accompanying text, might be viewed as consideration of a nonstatutory aggravating circumstance that the murder was racially motivated. See *supra* note 38; *infra* note 317. Thus, the trial judge arguably considered two nonstatutory aggravating factors.

³⁰⁶ See 103 S. Ct. at 3428 (plurality opinion) (citing *Proffitt*, 428 U.S. at 256 n.14).

³⁰⁷ *Id.* The *Barclay* plurality's reliance on *Proffitt* is misplaced for at least three reasons. First, the specific issue forming the "central question" in *Barclay* was hardly discussed in *Proffitt* and was not considered dispositive in that case. In *Proffitt*, the trial judge followed the

Because the trial court's error involved only a violation of state law and not a violation of constitutional rights, the plurality in *Barclay* willingly deferred to the state's harmless error analysis.³⁰⁸ Justice Rehnquist noted that "mere errors of state law are not the concern of this Court . . . unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution."³⁰⁹ The plurality found that the state's harmless error analysis sufficiently guaranteed the defendant's constitutional rights because "the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless."³¹⁰

The *Barclay* plurality also rejected the defendant's contention that the trial judge's findings concerning four valid aggravating circum-

jury's advisory verdict recommending the death sentence. *Proffitt*, 428 U.S. at 246. In his written findings supporting the sentence, the judge found four aggravating circumstances. *Id.* One of the factors he listed—that Proffitt had the propensity to commit murder—was not listed among the statutory aggravating circumstances. In upholding the death sentence, the plurality opinion in *Proffitt* did not discuss the trial court's consideration of a nonstatutory factor, except for two brief references. The *Proffitt* plurality simply observed that "it is unclear that the Florida [Supreme] [C]ourt would ever approve a death sentence based entirely on nonstatutory aggravating circumstances." *Id.* at 257 n.14. Elsewhere, the plurality concluded that "[i]t seems unlikely that [the Florida Supreme Court would uphold a death sentence resting entirely on nonstatutory aggravating circumstances], since the capital-sentencing statute explicitly provides that '[a]ggravating circumstances shall be limited to the following [eight specified factors].'" *Id.* at 250 n.8 (quoting FLA. STAT. ANN. § 921.141(5) (West Supp. 1976-1977)) (emphasis by the *Proffitt* plurality).

Second, the *Barclay* plurality failed to note the *Proffitt* plurality's observation that reliance on nonstatutory factors in imposing a death sentence would probably not be tolerated by the Florida Supreme Court because such reliance violates the Florida statute.

Third, the *Barclay* plurality failed to mention a factual distinction between the two cases. Although the two cases involved the same statute, in *Proffitt* the trial judge erroneously included a nonstatutory aggravating factor in explaining his decision to follow the jury's recommendation of death, whereas the trial judge in *Barclay* expressly relied in part on a nonstatutory aggravating factor in rejecting the jury's recommendation of life imprisonment. Thus, in *Proffitt*, the trial judge committed a seemingly harmless error while following the sentencing jury's recommendation of death; but the trial judge's error in *Barclay* may have meant the difference between life and death because he chose to impose death despite the jury's recommendation of life imprisonment.

³⁰⁸ *Barclay*, 103 S. Ct. at 3428 (plurality opinion). The Florida harmless error analysis established in *Elledge v. State*, 346 So. 2d 998, 1002-03 (Fla. 1977), is based on the presence of mitigating circumstances. Where the sentencing authority considered an invalid aggravating circumstance in reaching its decision, and weighed it against one or more mitigating circumstances, the appellate court must remand for a new sentencing proceeding. Where the sentencing authority considered an invalid aggravating circumstance, but found no mitigating circumstances, the appellate court must remand only if it finds prejudicial error. The *Elledge* court explained: "The absence of mitigating circumstances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute." *Id.* at 1003 (emphasis in original).

³⁰⁹ *Barclay*, 103 S. Ct. at 3428 (plurality opinion) (citation omitted).

³¹⁰ *Id.* at 3428; see also *supra* note 308 (explaining Florida's harmless error analysis).

stances were unsupported by the evidence.³¹¹ "Our review of these findings," wrote Justice Rehnquist, "is limited to the question whether they are so unprincipled or arbitrary as to somehow violate the United States Constitution."³¹²

The plurality also concluded that the trial judge's use of his World War II experiences to support a finding that the crime was "especially heinous" did not warrant reversal of Barclay's sentence.³¹³ The judge's references to personal experience were acceptable because the Constitution does not require the "rigid and mechanical parsing of statutory aggravating factors" that would inevitably result were an attempt made "to separate the sentencer's decision from his experiences."³¹⁴ The plurality stated that "[a]s long as [sentencing] discretion is guided in a constitutionally adequate way . . . and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more."³¹⁵

Barclay, like *Zant*,³¹⁶ reduces the control that an exclusive list of statutory aggravating circumstances provides over sentencing discretion. In *Barclay*, increased discretion resulted from the sentencing judge's improper reliance on his own personal experiences³¹⁷ and the defendant's criminal record. The *Barclay* Court upheld the constitutionality of the judge's reliance on the defendant's criminal record as an aggravating circumstance despite the fact that such reliance directly controverted the state sentencing statute.³¹⁸ In a dissenting opinion,³¹⁹ Justice Marshall correctly warned that "fairness and consistency cannot be achieved if non-statutory aggravating circumstances are randomly introduced into the [sentencing] balance."³²⁰ If judges are allowed to decide for themselves whether to follow the state statute and consider only statutory aggravating circumstances, "the fate of an individual defendant will inevitably depend on whether on a given day his sentencer happened to respect the constraints imposed by [state] law. The decision to execute a human being," asserted Marshall, "surely should not depend

³¹¹ See *supra* note 284 and accompanying text.

³¹² 103 S. Ct. at 3423 (plurality opinion).

³¹³ *Id.* at 3423-24.

³¹⁴ *Id.* at 3424.

³¹⁵ *Id.* (citation omitted).

³¹⁶ See *supra* notes 224-78 and accompanying text.

³¹⁷ Although the trial judge cited his World War II experiences involving mass murders in Germany in support of his finding that Barclay's crime was especially heinous, see *supra* note 291, the judge's words indicate that he was treating Barclay's racial motivation as an independent aggravating circumstance. According to the judge, the legal system must "terminate and remove permanently from society those who would choose to initiate [a race war in this country]." 103 S. Ct. at 3423 n.6.

³¹⁸ See *supra* note 301 and accompanying text.

³¹⁹ 103 S. Ct. at 3437 (Marshall, J., dissenting).

³²⁰ *Id.* at 3443.

on such pot luck."³²¹

The Georgia statute considered in *Zant* did not require the sentencing authority to weigh all aggravating and mitigating circumstances,³²² and the *Zant* Court explicitly declined to state whether it thought an invalid factor could be considered in states such as Florida that mandate the weighing of all statutory circumstances.³²³ In *Barclay*, however, the Court went further than it had in *Zant* by approving the consideration of invalid aggravating circumstances even where the sentencing statute requires such a weighing.³²⁴ By expanding the *Zant* decision in this manner, the Court further decreased the sentencing control provided by statutory aggravating factors.

In *Barclay*, the plurality ignored the standard of fairness and consistency that the Court applied in earlier capital sentencing cases. In affirming the death sentence, the plurality limited its examination of the trial judge's findings concerning the four statutory aggravating circumstances to a determination of whether these findings were "so unprincipled or arbitrary as to somehow violate the . . . Constitution."³²⁵ In a concurring opinion,³²⁶ Justice Stevens objected to this standard, asserting that "the Court has never thought [this standard was] sufficient in a capital case."³²⁷ The plurality opinion typifies the Court's increasing

³²¹ *Id.*

³²² See *supra* notes 242-43 and accompanying text.

³²³ See *Zant v. Stephens*, 103 S. Ct. 2733, 2750 (1983).

³²⁴ See FLA. STAT. ANN. § 921.141(2)(b) (West Supp. 1983) (jury shall render its advisory sentence based upon "[w]hether sufficient mitigating circumstances exist which outweigh the [enumerated] aggravating circumstances found to exist").

³²⁵ *Barclay*, 103 S. Ct. at 3423 (plurality opinion).

³²⁶ *Id.* at 3428 (Stevens, J., concurring).

³²⁷ *Id.* at 3429. Stevens rejected the Court's new approach, inquiring instead as to whether the Florida statute narrows the group eligible for the death penalty and assures "consistently applied appellate review." *Id.* "A constant theme of our cases," asserted Justice Stevens, "has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner." *Id.*

In concluding that the trial court's use of invalid aggravating circumstances did not require reversal of *Barclay*'s death sentence, Justice Stevens found that

[t]he Florida rule . . . affords greater protection than the federal Constitution requires.

. . . Under Florida law, if there are no statutory mitigating circumstances, one valid statutory aggravating circumstance will generally suffice to uphold a death sentence on appeal even if other aggravating circumstances are not valid. The federal Constitution requires no more, at least as long as none of the invalid aggravating circumstances is supported by erroneous or misleading information.

Id. at 3432-33 (citing *Zant v. Stephens*, 103 S. Ct. at 2748-49) (footnotes omitted).

Justice Stevens pointed out that Florida law allows a prosecutor to introduce evidence of a defendant's prior criminal record at the sentencing phase to negate a mitigating factor. *Id.* at 3434. Thus, Stevens concluded that the jury and judge at *Barclay*'s sentencing proceeding properly considered evidence of *Barclay*'s prior criminal record. *Id.* at 3434-35.

Justice Marshall also objected to the plurality's standards. In a dissenting opinion, he noted that

reluctance to find fault with state capital sentencing schemes and state court capital sentencing decisions.

Because the plurality opinion in *Barclay* stressed the importance of deference to state courts in reviewing death sentences where state error is involved,³²⁸ the decision may not be applicable to similar cases involving questions of constitutional error. *Zant* held that the sentencing authority may consider statutory aggravating circumstances that are invalid on constitutional grounds.³²⁹ This holding was limited, however, to statutes that do not require the weighing of all aggravating and mitigating circumstances.³³⁰ Thus, *Zant* and *Barclay* leave open the question of whether a sentencing authority that must weigh all statutory factors may consider constitutionally invalid aggravating circumstances.

The plurality opinion in *Barclay* stressed the nature of the Florida court's harmless error analysis.³³¹ The Florida analysis regards the trial judge's reliance on invalid aggravating circumstances as harmless error only when no mitigating circumstances exist.³³² The plurality appeared to place considerable weight on this doctrine in endorsing the state supreme court's harmless error ruling.³³³ Thus, *Barclay* may be limited to cases involving a similar state harmless error doctrine.

Even if the *Barclay* decision is narrowly applied, it still permits the sentencing authority to predicate the death sentence on invalid or extraneous aggravating factors if it also finds at least one valid statutory aggravating factor. Such a rule is ill advised: although the sentencing judge in *Barclay* had the discretionary authority to impose the death penalty based on the valid aggravating circumstances he found, he might have decided against the death sentence if he had not considered the invalid and extraneous aggravating factors.³³⁴ The allowance of such flexibility in the consideration of aggravating factors undermines statutory supervision of sentencing discretion and thus increases the possibility of arbitrary, discriminatory, or excessive sentencing decisions.

[t]he plurality opinion departs from the Court's past insistence on consistency and fairness in the capital sentencing process. Under the plurality's view, the standard for review of a death sentence would apparently be "limited" to whether its imposition was "so unprincipled or arbitrary as to somehow violate the United States Constitution." . . . This standard is devoid of any meaningful content I see no way to reconcile this standard with the requirements of the Constitution.

Id. at 3443 (Marshall, J., dissenting) (footnote omitted).

³²⁸ See *id.* at 3428 (plurality opinion).

³²⁹ See *Zant*, 103 S. Ct. at 2746-50; *supra* notes 208-78 and accompanying text.

³³⁰ *Zant*, 103 S. Ct. at 2744-46.

³³¹ See *Barclay*, 103 S. Ct. at 3426-28 (plurality opinion).

³³² See *id.* at 3426-27.

³³³ See *id.* at 3428.

³³⁴ See *id.* at 3442-43 (Marshall, J., dissenting) (arguing that the trial judge's reliance on an invalid aggravating circumstance is a constitutional violation).

C. *California v. Ramos*

In *California v. Ramos*,³³⁵ the Supreme Court upheld a death sentence despite the judge's instruction to the sentencing jury that the governor might later commute or otherwise reduce a sentence of life imprisonment without parole. *Ramos*, like *Zant* and *Barclay*, illustrates the Court's approval of capital sentencing practices that permit a greater possibility of unfair or inconsistent sentencing decisions.

A California jury found Ramos guilty of first degree murder for the slaying of a restaurant employee during the course of an armed robbery.³³⁶ At a separate sentencing proceeding,³³⁷ the judge, in accord with the statute mandated "Briggs instruction,"³³⁸ informed the jury of the governor's power to commute a sentence following conviction of a crime.³³⁹ The jury was warned that the governor "may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole."³⁴⁰ The judge did not instruct the jury that the governor could also commute a death sentence.³⁴¹ The jury subsequently sentenced Ramos to death.³⁴²

³³⁵ 103 S. Ct. 3446 (1983).

³³⁶ *People v. Ramos*, 30 Cal. 3d 553, 563-64, 639 P.2d 908, 912-13, 180 Cal. Rptr. 266, 270-71 (1982), *rev'd*, 103 S. Ct. 3446 (1983). Ramos and a co-conspirator went to a fast food restaurant, where Ramos was employed as a janitor, to commit armed robbery. Ramos forced two employees into the walk-in refrigerator and, after emptying the safe, shot both workers, killing one and wounding the other. *Id.*

³³⁷ Under California law, a person convicted of first degree murder may be sentenced to death or to life imprisonment without possibility of parole only when the jury finds a statutory "special circumstance." *See* CAL. PENAL CODE § 190.2 (West Supp. 1983). The special circumstance found in *Ramos* was "commission of the murder during the course of a robbery." 103 S. Ct. at 3449 n.1.

³³⁸ The "Briggs instruction" derives its name from a 1978 voter initiative in California, known as the Briggs initiative. 103 S. Ct. at 3450 n.4.

³³⁹ *Id.* at 3450.

³⁴⁰ *Id.* California's death penalty statute also requires the judge to instruct the jury on the proper use of aggravating and mitigating circumstances. The jury must compare the aggravating circumstances to the mitigating circumstances. If the aggravating circumstances outweigh the mitigating circumstances then the jury must impose the death sentence. If the mitigating circumstances outweigh the aggravating circumstances, then the jury must impose a sentence of life imprisonment without possibility of parole. CAL. PENAL CODE § 190.3 (West Supp. 1983). *See* 103 S. Ct. at 3449 n.3.

³⁴¹ California law prohibits such an instruction. *See People v. Morse*, 60 Cal. 2d 631, 652-53, 388 P.2d 33, 46-47, 36 Cal. Rptr. 201, 214-15 (1964).

³⁴² 103 S. Ct. at 3450. The California Supreme Court affirmed Ramos's conviction but reversed his death sentence, finding the Briggs instruction unconstitutional. *See People v. Ramos*, 30 Cal. 3d 553, 590-602, 639 P.2d 908, 929-36, 180 Cal. Rptr. 266, 287-94 (1982), *rev'd*, 103 S. Ct. 3446 (1983). The California Supreme Court concluded:

Instead of assuring that the jury's life-or-death decision rests on "consideration of the character and record of the individual offender and the circumstances of the particular offense" . . . , the [Briggs] instruction focuses the attention of the jury on the fact that the Governor has the power to render the defendant eligible for parole if the jury does not vote to execute him. . . .

In a five-to-four decision,³⁴³ the Supreme Court held that the Briggs instruction did not violate the federal Constitution.³⁴⁴ Ramos contended that "a capital sentencing jury may not constitutionally consider possible commutation."³⁴⁵ This contention raised "two related,

The challenged instruction thus improperly leads the jury far beyond the constitutional safeguards of due process of law.

Id. at 591, 639 P.2d at 929-30, 180 Cal. Rptr. at 287-88 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (Stewart, J., plurality opinion)).

The California Supreme Court also found that the Briggs instruction "suffers from a second and perhaps deeper constitutional flaw" because "it neglects to tell the jury that a sentence of death may likewise be modified by the Governor to permit parole." *Id.* at 591, 639 P.2d at 930, 180 Cal. Rptr. at 288 (emphasis in original). The California court concluded that, because of this omission, "[t]he jury is left with the mistaken belief . . . that the only sure way to keep the defendant off the streets is to condemn him to death." *Id.*

³⁴³ Justice O'Connor wrote the majority opinion. 103 S. Ct. at 3449. Justice Marshall wrote a dissenting opinion joined by Justice Brennan and joined in part by Justice Blackmun. *Id.* at 3460. Justice Blackmun, *id.* at 3467, and Justice Stevens, *id.* at 3468, also wrote separate dissenting opinions.

³⁴⁴ 103 S. Ct. at 3460.

³⁴⁵ *Id.* at 3451 (footnotes omitted). Ramos also argued that "the Briggs Instruction unconstitutionally misleads the jury by selectively informing it of the Governor's power to commute" a sentence of life imprisonment without parole, but not of his power to commute the death sentence. *Id.* By creating "the misleading impression that the jury can prevent the defendant's return to society only by imposing the death sentence," the instruction biases the jury "in favor of death." *Id.* at 3458. Ramos further contended that a "decision based on mistake is not only unreliable, it is arbitrary and capricious, and undermines the entire purpose of guided discretion: to provide a meaningful basis for distinguishing between the few who are sentenced to death and the many who are not sentenced to death." Brief for Respondent at 32, *California v. Ramos*, 103 S. Ct. 3446 (1983) (citing *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)).

Ramos argued that the judge should disclose the governor's full power of commutation, including his power to commute the death sentence. *See* 103 S. Ct. at 3458. The Court found this argument "puzzling," and concluded that "an instruction disclosing the Governor's power to commute a death sentence may operate to the defendant's distinct disadvantage." *Id.*

A jury concerned about preventing the defendant's potential return to society will not [be] any less inclined to vote for the death penalty upon learning that even a death sentence may not have such an effect. In fact, advising jurors that a death verdict is theoretically modifiable, and thus not "final," may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.

Id.

Justice Marshall correctly criticized the majority's conclusion:

If the Briggs Instruction is indeed misleading, and the majority never denies that it may [be] . . . , it can hardly be defended on the ground that a balanced instruction would be more prejudicial. If, as the majority points out, . . . there are compelling reasons for not informing the jury as to the Governor's power to commute death sentences, the solution is not to permit a misleading instruction, but to prohibit altogether any instruction concerning commutation. This point seems to have eluded the majority. For some inexplicable reason it concludes that, since a balanced instruction is unavailable, the State is free to mislead the jury about the Governor's clemency power.

Id. at 3461 (Marshall, J., dissenting) (emphasis in original) (footnote omitted). Justice Marshall also noted that "[t]he conclusion that juries should not be permitted to consider commutation and parole in deciding the appropriate sentence is shared by nearly every jurisdiction

but distinct concerns.”³⁴⁶ First, that consideration of commutation “is so speculative a factor that it injects an unacceptable level of unreliability into the capital sentencing determination,”³⁴⁷ and second, that such consideration “deflects the jury from its constitutionally mandated task of basing the penalty decision on the character of the defendant and the nature of the offense.”³⁴⁸

The *Ramos* Court addressed the issue of unreliability in sentencing by relying on *Jurek v. Texas*.³⁴⁹ The Court noted that the possibility of commutation is no more speculative than certain elements of the sentencing statute that the Court approved in *Jurek*.³⁵⁰ Under the Texas statute,³⁵¹ the sentencing jury must decide “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”³⁵² The *Ramos* Court found that the Briggs instruction required similar speculation because it brought “to the jury’s attention” the possibility that the defendant someday may be freed, and thus “invite[d] the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society.”³⁵³ The Court there-

which has considered the question.” *Id.* at 3465-66. See Brief for Respondent at 11-17, *Ramos*, 103 S. Ct. 3446 (arguing that the overwhelming weight of state authority does not allow such consideration).

³⁴⁶ 103 S. Ct. at 3451 (majority opinion).

³⁴⁷ *Id.* *Ramos* argued that the Briggs instruction encourages speculation by requiring the jury, during its deliberation, to predict the probability that the governor will commute a death sentence. *Ramos* contended that governors exercise the power of commutation in an “erratic and unpredictable way.” Brief for Respondent at 24, *California v. Ramos*, 103 S. Ct. 3446 (1983). Therefore, “[a]ny effort to account for these factors in imposing a death sentence necessarily injects a level of unpredictability and unreliability in the sentence phase of a capital case that cannot be tolerated.” *Id.* at 25.

³⁴⁸ 103 S. Ct. at 3451.

³⁴⁹ 428 U.S. 262 (1976).

³⁵⁰ *Ramos*, 103 S. Ct. at 3453-54. The capital punishment statute upheld in *Jurek* requires capital sentencing juries to determine whether the defendant deliberately intended to cause death, and “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.” TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon 1981); see *supra* note 128. An affirmative answer to each of these special interrogatories is required before the death sentence is imposed. See TEX. CODE CRIM. PROC. ANN. art. 37.071(c) (Vernon 1981). In *Jurek*, the defendant argued that “it is impossible to predict future behavior and that the question [concerning future dangerousness] is so vague as to be meaningless.” *Jurek*, 428 U.S. at 274. The plurality in *Jurek* rejected this argument, reasoning that decisions of whether to release a defendant on bail, what sentence to impose in noncapital cases, and whether to grant parole all involve some assessment of future conduct. *Id.* at 275 (plurality opinion). The plurality opinion concluded: “What is essential is that the [capital sentencing] jury have before it all possible relevant information about the individual defendant whose fate it must determine.” *Id.* at 276.

³⁵¹ TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981).

³⁵² *Id.* art. 37.071(b)(2).

³⁵³ 103 S. Ct. at 3454. In his dissent, Justice Blackmun referred to the majority’s reasoning as “substituting an intellectual sleight of hand for legal analysis.” *Id.* at 3468 (Blackmun, J., dissenting).

fore found *Jurek* controlling,³⁵⁴ and held that consideration of possible commutation in capital cases was not offensive to the eighth and fourteenth amendments.³⁵⁵

The *Ramos* Court also dismissed the argument that consideration of commutation deflects the jury's attention from the defendant's character and offense.³⁵⁶ The Court reasoned that a sentencing jury may examine a broad array of factors in deciding whether to impose the death sentence without unconstitutionally deflecting their attention.³⁵⁷ "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment."³⁵⁸ The possibility of commutation "is simply one of the countless considerations weighed by the jury in seeking to judge the punishment appropriate to the individual defendant."³⁵⁹

³⁵⁴ See 103 S. Ct. at 3453 (majority opinion).

³⁵⁵ *Id.* at 3454 (footnote omitted). Ramos placed particular emphasis on *Gardner v. Florida*, 430 U.S. 349 (1977), in arguing that informing the jury of the governor's power of commutation reduces sentencing fairness. The *Gardner* Court reversed a death sentence where the defendant had no opportunity to deny or explain information in a presentence report that was prepared by the prosecution for trial but not disclosed to the defendant or his counsel. Ramos considered *Gardner* applicable to his case because "the [*Gardner*] Court considered the risk too great 'that some of the information accepted [by the judge] in confidence may be erroneous, or may be misinterpreted' and went on to note that 'if [the information] is the basis for the death sentence the interest in reliability plainly outweighs the State's interest.'" Brief for Respondent at 18, *California v. Ramos*, 103 S. Ct. 3446 (1983) (quoting *Gardner v. Florida*, 430 U.S. at 359).

The *Ramos* Court distinguished *Gardner*. Justice O'Connor concluded that "[t]he Briggs Instruction gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence." 103 S. Ct. at 3454 (footnote omitted).

³⁵⁶ See 103 S. Ct. at 3455-57.

³⁵⁷ See *id.* at 3456.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 3457 (quoting *Zant v. Stephens*, 103 S. Ct. 2733, 2755 (1983) (Rehnquist, J., concurring)).

Ramos relied on *Beck v. Alabama*, 447 U.S. 625 (1980), to support his argument that consideration of commutation deflects the jury's attention from the defendant's character and offense. See *Ramos*, 103 S. Ct. at 3456. In *Beck*, the Court invalidated an Alabama statute that prohibited the jury in a capital case from convicting the defendant of a lesser included offense. See ALA. CODE § 13-11-2(a) (1975). Under the Alabama statute, the jury had to find the defendant guilty of first degree murder or acquit him. See *Beck*, 447 U.S. at 628-30. The Court concluded that such a rule "enhance[s] the risk of an unwarranted conviction" because a jury would not want to allow someone they believed to be guilty of a serious crime to go unpunished. *Id.* at 637. This dilemma facing the jury "divert[s] the jury's attention from the central issue" of whether the prosecutor has proved guilt beyond a reasonable doubt and "introduce[s] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.* at 642-43.

The *Ramos* Court was "unconvinced that the Briggs Instruction constrains the jury's sentencing choice in the manner condemned in *Beck*." *Ramos*, 103 S. Ct. at 3456. The Court reasoned that the scheme in *Beck* was faulty because it artificially limited the jury's sentencing alternatives. The Briggs instruction, however, "does not *limit* the jury, . . . [instead] it places

The *Ramos* Court did not reach a sound decision. The holding in *Ramos* rejects the conclusion of many state courts, including California's, that a sentencing jury should not consider the possibility of pardon, parole, or commutation.³⁶⁰ Furthermore, the Briggs instruction permits the jury to consider a factor wholly unrelated to the defendant's character or the nature of his crime.³⁶¹ Finally, like the threshold analysis endorsed in *Zant*,³⁶² the *Ramos* Court's assertion that the sentencing jury in a capital case may consider a "myriad of factors"³⁶³ translates into virtually unbridled discretion once the sentencing authority finds one statutory aggravating circumstance.

III

ABANDONING THE PURSUIT OF FAIRNESS AND CONSISTENCY IN APPELLATE REVIEW OF DEATH SENTENCES

By accepting capital sentencing schemes that provide the sentencing authority with greater discretion, the Supreme Court has increased the likelihood that a sentencing authority may mask an otherwise arbitrary or discriminatory sentencing decision as "within its discretion." Increased discretion therefore creates a higher risk of capital sentencing errors.³⁶⁴ Post-sentencing appellate review, conducted by state or federal courts,³⁶⁵ provides a valuable (and final) opportunity to detect and

before the jury an additional element to be considered, along with many other factors, in determining which sentence is appropriate under the circumstances of the defendant's case." *Id.* (emphasis in original).

³⁶⁰ Twenty-nine states have considered this issue. Twenty-six, including California, have concluded "that the jury should not consider the possibility of pardon, parole, or commutation." *Ramos*, 103 S. Ct. at 3466 & n.13 (Marshall, J., dissenting); *see id.* at 3468 (Stevens, J., dissenting) (listing the 26 states that have adopted this position).

³⁶¹ *See id.* at 3464 (Marshall, J., dissenting) ("the mere possibility of a commutation . . . bears absolutely no relation to the nature of the offense or the character of the individual"). The Briggs instruction encourages the sentencing jury to consider the possibility of release rather than the probability of future criminal activity. *See id.* at 3462-63.

³⁶² *See supra* notes 224-33, 265-72 and accompanying text.

³⁶³ 103 S. Ct. at 3456 (majority opinion).

³⁶⁴ "Errors" in capital sentencing occur when the sentencing authority imposes the death penalty in an arbitrary or discriminatory fashion, or when the death penalty is excessive in relation to the crime, or disproportionate in view of sentences given defendants who committed similar crimes in that state.

³⁶⁵ Meaningful state appellate review should include comparative proportionality review, comparing the defendant's sentence with sentences given other defendants who committed similar crimes; a review of the individual sentencing authority's compliance with statutory capital sentencing guidelines; and, if necessary, the reinterpretation of overbroad or vague statutory provisions to limit those provisions to constitutionally permissible uses. *See, e.g., GA. CODE* § 17-10-35 (1982); *see infra* notes 374-91 and accompanying text. Collateral federal habeas corpus review advances fairness and consistency in capital sentencing by providing condemned persons with a federal forum in which to challenge the constitutionality of a capital sentencing scheme as applied in particular cases. *See infra* notes 469-82 and accompanying text.

rectify such errors before execution. In fact, state appellate courts and federal courts (primarily by habeas corpus) set aside death sentences in sixty percent of death penalty cases.³⁶⁶ Consequently, the more discretion the Court allows judges and juries in capital sentencing, the greater the need for meaningful appellate review of the sentencing authority's decision.³⁶⁷ Post-sentencing judicial supervision reinforces and clarifies statutory sentencing guidelines, and is an increasingly indispensable ingredient of a constitutionally valid statutory sentencing scheme.

Although meaningful appellate review is particularly useful and important in capital sentencing schemes that permit broad sentencing discretion, the Supreme Court, in two recent decisions, upheld significant restrictions on a condemned person's opportunity to obtain such review. In *Pulley v. Harris*,³⁶⁸ the Court held that the eighth and fourteenth amendments do not require comparative proportionality review of death sentences.³⁶⁹ *Harris* thus disregarded prior Court assertions of the importance of such review. Before *Harris*, the Court frequently recognized that proportionality review provides a valuable post-sentencing check against unfair or inconsistent capital sentencing decisions³⁷⁰—a check that statutory sentencing guidelines cannot supply.

In *Barefoot v. Estelle*,³⁷¹ the Court authorized United States courts of appeals to adopt summary procedures for federal habeas corpus appeals in death penalty cases, exhibiting new impatience with execution delays caused by the processing of federal habeas corpus petitions.³⁷² Recent denials of applications for stays of execution and denials of petitions for certiorari further demonstrate this new impatience.³⁷³

The *Barefoot* and *Harris* decisions may herald a new tolerance for procedural shortcuts in federal and state appellate review of death sentences. Such shortcuts will inevitably reduce fairness and consistency in capital sentencing. Coupled with the Court's recent tolerance of increased sentencing discretion, this tolerance of procedural shortcuts may portend a substantial increase in executions of unconstitutionally convicted or sentenced defendants.

³⁶⁶ Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 918 (1982). By comparison, federal appellate courts reverse only 6.5% of appealed federal criminal judgments. *Id.*

³⁶⁷ The need for meaningful appellate review is even greater when the sentencing authority is a jury because a jury meets only once, has little or no experience with its task, and varies greatly in its composition. See *McGautha v. California*, 402 U.S. 183, 295-96 (1971) (Brennan, J., dissenting). Of course, judges may also impose arbitrary, discriminatory, or erroneous sentences.

³⁶⁸ 104 S. Ct. 871 (1984).

³⁶⁹ *Id.* at 875-76.

³⁷⁰ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 195, 204-06 (1976); *Proffitt v. Florida*, 428 U.S. 242, 258-59 (1976). For a discussion of *Harris* and the need for comparative proportionality review, see *infra* notes 436-68 and accompanying text.

³⁷¹ 103 S. Ct. 3383 (1983).

³⁷² 103 S. Ct. at 3394-95.

³⁷³ See *infra* note 559 and accompanying text.

A. Direct Appellate Review by State Courts

1. *The Functions of Direct Appellate Review*

Direct review of death sentences by state appellate courts ideally consists of a three-part inquiry. First, it involves a comparative proportionality review in which the reviewing court compares the defendant's sentence with sentences given defendants who committed similar crimes in that state.³⁷⁴ Second, direct post-sentencing review provides a procedural review, allowing a court to determine whether the sentencing authority applied the statutory capital sentencing guidelines improperly or prejudicially.³⁷⁵ Third, the reviewing court may perform a narrowing function: where a statutory capital sentencing guideline is susceptible to an overbroad, vague, or otherwise unconstitutional interpretation, the reviewing court may narrowly interpret the guideline to confine it to constitutionally permissible uses.³⁷⁶ In sum, comparative proportional-

³⁷⁴ See, e.g., *Presnell v. State*, 241 Ga. 49, 63-64, 243 S.E.2d 496, 508 (1978) (finding death penalty proportional to sentences in similar cases), *rev'd in part on other grounds per curiam*, 439 U.S. 14 (1978); *State v. Bolder*, 635 S.W.2d 673, 690 (Mo. 1982) (en banc) (same); *Smith v. State*, 659 P.2d 330, 337-38 (Okla. Crim. App. 1983) (same). In *Pulley v. Harris*, 104 S. Ct. 871 (1984), the Supreme Court held that the eighth amendment does not require comparative proportionality review. See *infra* notes 436-68 and accompanying text.

Comparative proportionality review is distinguishable from "pure" proportionality review, which compares the crime to the punishment. The Supreme Court recently held that the eighth and fourteenth amendments require courts to perform "pure" proportionality review in the course of all criminal appeals. *Solem v. Helm*, 103 S. Ct. 3001, 3016 (1983). In *Solem*, the Court held that a life sentence without parole constituted cruel and unusual punishment because it was "significantly disproportionate" to the defendant's crime—the passing of a \$100 bad check, which resulted in the defendant's seventh nonviolent felony conviction. *Id.* The Court found that in performing this review, courts should consider "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals [for more serious crimes] in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 3010-11. Nevertheless, the *Solem* Court noted that findings of a constitutional degree of disproportionality by a reviewing court should be rare, given the "substantial deference" due the legislature's calculation of what punishment is most appropriate for a particular crime. *Id.* at 3009 & n.16. The Supreme Court has performed this crime-to-punishment proportionality review in several capital cases. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court found the death penalty unconstitutionally disproportionate to the crime of rape. *Id.* at 592. In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court concluded that the death penalty was disproportionate to a conviction of felony murder where the defendant did not "kill, attempt to kill, or intend that a killing take place or that lethal force . . . be employed." *Id.* at 797.

³⁷⁵ See, e.g., *Fleming v. State*, 243 Ga. 120, 123, 252 S.E.2d 609, 612 (1979) (death penalty not imposed under influence of passion, prejudice, or other arbitrary factor); *Prevatte v. State*, 233 Ga. 929, 931-33, 214 S.E.2d 365, 367-68 (1975) (reversing two death sentences because prosecutor's reference to defendant's right to appeal constituted prejudicial error); *Tichnell v. State*, 287 Md. 695, 415 A.2d 830 (1980) (arbitrary factor influenced death sentence imposed upon defendant when defendant waived jury determination of sentencing because of judge's comment that case did not merit death penalty); *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981) (reversal of death sentence; solicitor's inclusion of personal opinion during closing argument may have influenced jury to consider an arbitrary factor in its deliberations).

³⁷⁶ See, e.g., *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973) (limiting statutory aggravating

ity review focuses on the sentence itself and sentences in similar cases; procedural review looks at the individual sentencing authority's compliance with that state's statutory capital sentencing guidelines; and the narrowing function examines the statutory scheme itself for potential constitutional flaws.

a. *Comparative Proportionality Review*

Statutory post-sentencing comparative proportionality review may be the best means of ensuring that a state's statutory capital sentencing scheme is functioning within the eighth amendment guidelines established by *Furman v. Georgia*,³⁷⁷ *Gregg v. Georgia*,³⁷⁸ and *Lockett v. Ohio*.³⁷⁹ This review measures the consistency with which sentencing authorities impose the death penalty—a crucial factor in discerning potentially cruel and unusual punishment.³⁸⁰ Of the thirty-seven states that presently permit the death penalty,³⁸¹ thirty-one require comparative proportionality review of death sentences.³⁸² For example, Georgia's statutory capital sentencing scheme, approved by the Court in *Gregg*, requires the Georgia Supreme Court to undertake a proportionality re-

circumstance that murder was "especially heinous, atrocious or cruel" to murders that are "conscienceless or pitiless crime[s] which [are] unnecessarily torturous to the victim"); *Harris v. State*, 237 Ga. 718, 731-33, 230 S.E.2d 1, 10-11 (1976) (limiting statutory aggravating circumstance that the murder was "outrageously or wantonly vile, horrible or inhuman" in that it involved "torture, depravity of mind, or an aggravated battery to the victim" to "those cases that lie at the core"); *State v. Pritchett*, 621 S.W.2d 127, 137-39 (Tenn. 1981) (reversing death sentence; limiting statutory aggravating circumstance that "murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind" to murders involving torture before victim's death). Some state appellate courts prefer to invalidate unconstitutionally vague or overbroad capital sentencing provisions rather than reinterpret them. *See, e.g., State v. White*, 395 A.2d 1082, 1090-91 (Del. 1978) (finding language of statutory aggravating circumstance that victim was "elderly" and "defenseless" unconstitutionally vague); *State v. Chaplin*, 433 A.2d 327, 329-30 (Del. Super. Ct. 1981) (finding statutory aggravating circumstance that murder was "outrageously or wantonly vile, horrible, or inhuman" unconstitutionally vague); *Arnold v. State*, 236 Ga. 534, 542, 224 S.E.2d 386, 392 (1976) (holding statutory aggravating circumstance that defendant had a "substantial history of serious assaultive criminal convictions" unconstitutionally vague).

³⁷⁷ 408 U.S. 238 (1972).

³⁷⁸ 428 U.S. 153 (1976).

³⁷⁹ 438 U.S. 586 (1978). For a discussion of *Furman*, *Gregg*, and *Lockett*, see *supra* notes 70-119, 150-60, 177-88 and accompanying text. In *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982), the Court summarized the guidelines established in these cases as requiring that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." For a discussion of *Eddings*, see *supra* notes 161-88 and accompanying text.

³⁸⁰ See *supra* notes 70-97 and accompanying text.

³⁸¹ See *infra* text accompanying note 579-80. Vermont has a death penalty statute that is not presently used and may be unconstitutional. See *infra* notes 589-91 and accompanying text.

³⁸² See *infra* notes 747-52 and accompanying text. Of these 31 states, 26 provide for comparative proportionality review of death sentences by statute, *infra* note 749 and accompanying text. In four other states, state appellate case law provides for such review, *infra* note 752 and accompanying text. In Louisiana, the rules of the state supreme court require comparative proportionality review, see *infra* note 751 and accompanying text.

view of all death sentences to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."³⁸³ The Georgia Supreme Court considers similar death penalty cases as well as appealed murder cases where the sentencing authority imposed a life sentence.³⁸⁴ In addition, the statute requires the Georgia Supreme Court to "include in its decision a reference to those similar cases which it took into consideration."³⁸⁵ Comparative proportionality review thus fulfills the *Furman* mandate of fairness and consistency in capital sentencing by assessing "whether *in fact* the death penalty was being administered for any given class of crime in a discriminatory, standardless, or rare fashion."³⁸⁶

b. *Procedural Compliance Review*

Appellate review also focuses on the sentencing authority's application of the relevant statutory capital sentencing guidelines. For example, the Georgia death penalty statute requires the Georgia Supreme Court to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor."³⁸⁷ A careful, case-by-case assessment of the evidence and the sentencing au-

³⁸³ GA. CODE § 17-10-35(c)(3) (1982).

³⁸⁴ See, e.g., *Horton v. State*, 249 Ga. 871, 880-81, 295 S.E.2d 281, 289-90 (1982) (death sentence upheld); *Buttrum v. State*, 249 Ga. 652, 657, 293 S.E.2d 334, 339-40 (1982) (same); *Jones v. State*, 249 Ga. 605, 613-14, 293 S.E.2d 708, 715 (1982) (same); *Waters v. State*, 248 Ga. 355, 370-71, 283 S.E.2d 238, 251-52 (1981) (same).

³⁸⁵ GA. CODE § 17-10-35(e) (1982).

Justice Rehnquist raised a valid objection to comparative proportionality review in his dissenting opinion in *Woodson v. North Carolina*, 428 U.S. 280, 318 (1976) (Rehnquist, J., dissenting). The death penalty statutes of Georgia, Florida, and Texas, upheld in *Gregg*, *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), respectively, do not require the sentencing authority to indicate the reasons for its decision should it choose *not* to sentence the defendant to death. See *Woodson*, 428 U.S. at 318 (Rehnquist, J., dissenting). Any comparative proportionality review performed by an appellate court pursuant to one of those three statutory schemes must therefore do without such information. This deficiency creates two problems. First, comparative proportionality review cannot correct the sentences of the "fortunate few who are the beneficiaries of random discretion exercised by juries." *Id.* at 318-19 (emphasis added). This random discretion is a minor problem, however. In *Gregg*, the Court asserted that because comparative proportionality review "is intended to prevent caprice in the decision to inflict the [death] penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed . . . under a system that does not create a substantial risk of arbitrariness or caprice." 428 U.S. at 203 (plurality opinion). More importantly, this deficiency limits the scope of comparative proportionality review. In comparing the defendant's death sentence with sentences in similar death penalty cases, a reviewing court will have only the objective facts of those cases in which the sentencer did not impose death. The court will therefore be forced to guess as to the substantive reasons behind the sentencing authority's decision not to impose the death penalty. This deficiency may reduce the effectiveness of comparative proportionality review, but it speaks more for the need for detailed explanations of sentencing decisions in non-death sentence cases than against such review.

³⁸⁶ *Gregg*, 428 U.S. at 222-23 (White, J., concurring).

³⁸⁷ GA. CODE § 17-10-35(c)(1) (1982).

thority's reasoning permits detection of those instances when the sentencing authority, in exercising its discretion, may have exceeded the bounds of the statutory capital sentencing guidelines. While comparative proportionality review ensures consistent system-wide enforcement of a constitutionally permissible capital sentencing scheme, procedural compliance review ensures that an appellate court will reverse a death sentence imposed arbitrarily or capriciously even when such a sentence appears consistent with prior decisions of the state's highest court.

c. *The Narrowing Function*

Where a statutory capital sentencing guideline is susceptible to an overbroad, vague, or otherwise unconstitutional interpretation, the reviewing court may narrow the scope or use of the guideline to within constitutionally permissible bounds. Although at least two Justices have recognized the possibility of arbitrary sentencing under an overbroad capital sentencing provision narrowly interpreted on appeal in order to uphold a sentence,³⁸⁸ the Supreme Court has repeatedly recognized the propriety of this narrowing function.³⁸⁹ Given the difficulties inherent in the legislature's task of minimizing the sentencing authority's discretion while permitting the authority to assess the individual defendant's character, record, and personal background,³⁹⁰ this narrowing function provides needed judicial review of the statutory guidelines themselves. Although the narrowing function may involve a degree of judicial interference in areas of legislative responsibility, it facilitates swifter establishment of a constitutionally permissible capital sentencing scheme. Moreover, the narrowing function eliminates the difficulty and potential inequity of temporary judicial action that could occur without a capital sentencing statute in force during the period between invalidation and

³⁸⁸ Justice Marshall, joined by Justice Brennan, voiced such a concern in a concurring opinion in *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (Marshall, J., concurring in judgment). Justice Marshall declared that because "it is the *sentencer's* discretion that must be . . . guided by clear, objective, and specific standards," ambiguous statutory language "could not be cured by the *post hoc* narrowing construction of an appellate court." *Id.* at 437 (emphasis in original). Moreover, "[a]ppellate case law is less likely to help the sentencing authority directly in jurisdictions where juries rather than judges make the life-or-death decision," because juries are usually unaware of such case law. *Dix, Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 107 (1979). Justice Marshall would permit courts to use the narrower construction in subsequent cases, however, provided that they advise sentencing juries of the narrow construction in sentencing instructions. 446 U.S. at 437 (Marshall, J., concurring in judgment).

³⁸⁹ *See, e.g., Godfrey v. Georgia*, 446 U.S. 420, 429 (1980); *Gregg v. Georgia*, 428 U.S. 153, 202 & n.54 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242, 256 (1976) (plurality opinion). The *Godfrey* Court rejected the Georgia Supreme Court's interpretation of a statutory aggravating circumstance because it was inconsistent with the Georgia court's own prior efforts to construe narrowly that aggravating circumstance. *Godfrey*, 446 U.S. at 432; *see also Dix, supra* note 388, at 108.

³⁹⁰ *See infra* notes 407-13 and accompanying text.

reenactment.³⁹¹

Comparative proportionality review, procedural compliance review, and the narrowing function in combination provide a comprehensive check on the legislature and the sentencing authority, by evaluating the statutory scheme, the consistency of the scheme's application in the courts, and individual application of the scheme by sentencing authorities.

2. *Support for a Constitutional Requirement of Appellate Review: Supreme Court Decisions Prior to Pulley v. Harris*

The establishment of a constitutional right to any form of appellate review of death sentences would be unprecedented; the Supreme Court has long maintained that rights of appeal are not constitutionally guaranteed, but must instead be created by state law.³⁹² Nevertheless, in *Furman*, Justice Stewart recognized that:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.³⁹³

In subsequent cases, members of the Court have repeatedly recognized the unique nature of the death penalty.³⁹⁴ Death is "the only punishment that may involve the conscious infliction of physical pain."³⁹⁵ In addition, the death penalty is unique in its relationship to the four traditional goals of criminal punishment: rehabilitation, incapacitation, de-

³⁹¹ Furthermore, judicial review is clearly appropriate as an independent check on the constitutionality of statutory schemes. See *Gregg v. Georgia*, 428 U.S. 153, 174 n.19 (1976) (plurality opinion) ("legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power") (citations omitted).

³⁹² See, e.g., *Ross v. Moffitt*, 417 U.S. 600, 606 (1974); *McKane v. Durston*, 153 U.S. 684, 687 (1894); see also *Dix*, *supra* note 388, at 106 n.77. Justice Rehnquist cited this principle in his dissent in *Woodson v. North Carolina*, 428 U.S. 280, 319 (1976) (Rehnquist, J., dissenting), concluding that it is unlikely that "any provision of the Constitution can be read to require . . . appellate review." Justice Rehnquist's criticism of the Court's decision suggested that a majority of the Court believed that the due process clause required appellate review of death sentences. *Id.* at 324.

³⁹³ *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); see also *id.* at 286-90 (Brennan, J., concurring).

³⁹⁴ See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 272 (1980); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); see also *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 118 (1983).

³⁹⁵ *Furman*, 408 U.S. at 288 (Brennan, J., concurring). In addition, Justice Brennan noted that "the process of carrying out a verdict of death is often so degrading and brutalizing . . . as to constitute psychological torture." *Id.* (quoting *People v. Anderson*, 6 Cal. 3d 628, 649, 493 P.2d 880, 894, 100 Cal. Rptr. 152, 166 (1972)).

terrence, and retribution. It rejects rehabilitation³⁹⁶ and serves the second goal, incapacitation, no better than life imprisonment.³⁹⁷ Furthermore, the death penalty has no clearly established deterrent effect.³⁹⁸ Ultimately, therefore, if justification for the death penalty exists, it must arise from the retributive goal.³⁹⁹

Because the deprivation of a criminal defendant's life differs qualitatively from all other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."⁴⁰⁰ The Supreme Court therefore

³⁹⁶ *Furman*, 408 U.S. at 306 (Stewart, J., concurring); see *supra* note 393 and accompanying text.

³⁹⁷ See *Gregg v. Georgia*, 428 U.S. 153, 236 n.14 (1976) (Marshall, J., dissenting); see also Greenberg, *supra* note 366, at 927.

³⁹⁸ The deterrence of heinous crimes is probably the most common argument advanced in favor of capital punishment. See, e.g., CALIFORNIA DEPT OF JUST., MURDER AND THE DEATH PENALTY: A SPECIAL REPORT TO THE PEOPLE 8 (1981) (criticizing the California Supreme Court for "thwarting death penalty laws," and claiming that "the citizens of California are four times more likely to be [murdered] today than they were when killers were executed"); Carrington, *Deterrence, Death, and the Victims of Crime: A Common Sense Approach*, 35 VAND. L. REV. 587, 596 (1982) (advocating a "common sense analysis" to support the deterrence theory; noting that the number of recorded murders in the United States doubled from 10,000 in 1966 to 20,000 in 1976 during the ten-year nationwide moratorium on capital punishment); Yunker, *The Relevance of the Identification Problem to Statistical Research On Capital Punishment*, 28 CRIME & DELINQ. 96, 96 (1982) [hereinafter cited as Yunker, *The Relevance of the Identification Problem*] (analyzing methodological problems with studies that fail to find evidence of the death penalty's deterrent effect, and concluding that "the hypotheses relied upon by the defenders of capital punishment possess greater inherent plausibility than those relied upon by its opponents"); cf. Cederblom & Munevar, *The Death Penalty: The Relevance of Deterrence*, CRIM. JUST. REV., Spring 1982, at 63 (advancing a theoretical argument that the deterrence rationale for capital punishment is not limited to deterring future murders, but that deterrence also serves a retributivist function).

Nevertheless, as Justice Stewart's plurality opinion in *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion), acknowledged, "[a]lthough some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view." *Id.* at 185. Of 27 studies published between 1975 and 1980, only five found evidence of deterrence. Yunker, *Testing the Deterrent Effect of Capital Punishment*, 19 CRIMINOLOGY 626, 631 (1981-82); see also Faia, *Willful, Deliberate, Premeditated and Irrational: Reflections On the Futility of Executions*, 55 STATE GOV'T 14-21 (1982) (rebutting assumption of deterrence theory that would-be murderers rationally calculate the risks of their contemplated behavior before acting); *id.* at 20 (noting that "[t]he deterrence hypothesis, as applied to capital punishment, has not withstood the test of social research"); Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1224-25 (1981) (providing comprehensive analysis of recent studies and concluding that "[t]he empirical evidence is . . . sufficiently strong and one-sided that we should . . . [make] the assumption that capital punishment does not deter"); Yunker, *The Relevance of the Identification Problem*, *supra*, at 96 (noting that the great majority of recent multiple regression studies fail to find that executions reduce the number of criminal homicides).

³⁹⁹ The relationship between the death penalty and the retributive goal of punishment is itself questionable. See *Gregg v. Georgia*, 428 U.S. 153, 236-41 (1976) (Marshall, J., dissenting); see also Greenberg, *supra* note 366, at 927 ("[w]hatever retributive function capital punishment might serve . . . cannot be served by the current system . . . in which executions occur only rarely and after great delay").

⁴⁰⁰ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); see *Califor-*

"has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, *as much as is humanly possible*, that the sentence was not imposed out of whim, passion, prejudice, or mistake."⁴⁰¹ In short, states must adopt the most thorough, fair, and consistent procedural safeguards reasonably available to ensure that sentencing errors are minimized.⁴⁰²

States may advance fairness and consistency in capital sentencing by requiring detailed sentencing guidelines and meaningful appellate review. In *Furman* and *Gregg*, the Court demanded detailed capital sentencing guidelines.⁴⁰³ The Court has never expressly held, however, that the eighth amendment requires meaningful appellate review of death sentences.⁴⁰⁴ Nevertheless, traces of support for mandatory appellate review of death sentences appear in the Court's (and individual Justice's) opinions,⁴⁰⁵ beginning with the Court's recognition of the inherent inadequacies of statutory sentencing guidelines in *McGautha v. California*.⁴⁰⁶

In *McGautha*, the Court recognized the impossibility of adequate legislative prescription of capital sentencing guidelines:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.⁴⁰⁷

nia v. Ramos, 103 S. Ct. 3446, 3451 (1983) ("The Court . . . has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."). See generally *The Supreme Court, 1982 Term*, *supra* note 394, at 118 & n.2; Comment, *Capital Punishment and the Waiver of Sentence Review*, 18 HARV. C.R.-C.L. L. REV. 483, 513 (1983).

⁴⁰¹ *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring) (emphasis added).

⁴⁰² See, e.g., *Zant v. Stephens*, 103 S. Ct. 2733, 2746-47 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982) (plurality opinion); *id.* at 118-19 (O'Connor, J., concurring); *Beck v. Alabama*, 447 U.S. 625, 637-38 & n.13 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349, 359 (1977) (plurality opinion); *id.* at 363-64 (White, J., concurring).

⁴⁰³ See *supra* notes 70-119 and accompanying text.

⁴⁰⁴ *Dix*, *supra* note 388, at 106 & n.77; Comment, *supra* note 400, at 511 n.135.

⁴⁰⁵ These traces of support for mandatory appellate review of death sentences do not conclusively establish that any particular form of appellate review is constitutionally required. See *Dix*, *supra* note 388, at 102. Nevertheless, such statements are relevant to an analysis of the Court's and the individual Justices' views on the subject. Ultimately, they support the conclusion that a constitutional requirement of meaningful appellate review (including both comparative proportionality review and procedural compliance review) would partially fill *Furman's* prescription for a capital sentencing scheme that produces fair and consistent results.

⁴⁰⁶ 402 U.S. 183 (1971); see *infra* notes 407-08 and accompanying text; see *supra* notes 63-188 and accompanying text for a more complete discussion of *McGautha*, *Furman*, and the *Furman* progeny.

⁴⁰⁷ *McGautha*, 402 U.S. at 204; see *supra* note 67; see also *Dix*, *supra* note 388, at 161; cf. *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) ("Necessity . . . fixes a point

Although the *McGautha* Court relied on this notion to uphold two statutory death penalty schemes that gave the sentencing authority "absolute discretion" in imposing the death penalty,⁴⁰⁸ *Furman* and subsequent cases have rejected that solution.⁴⁰⁹ Instead, the Court has permitted state legislatures to allocate sufficient discretion to the sentencing authority to permit consideration of the individual defendant's character and background,⁴¹⁰ while insisting on thorough statutory supervision of such discretion.⁴¹¹

Establishing a constitutional right of appellate review of death sentences would compensate for the natural deficiencies of legislatively prescribed sentencing guidelines, and thereby assure the degree of enforcement consistency that capital cases merit. Thus, although a constitutional right of judicial review does not exist for noncapital cases, the establishment of such a right for death penalty cases would be consistent with other procedural protections that are required only in capital cases.⁴¹² Such a right is indispensable to a constitutional capital sentencing scheme given the Supreme Court's recent willingness to allow increased sentencing discretion.⁴¹³

Although *Furman* itself contained little discussion of appellate review, the 1976 decisions, upholding three post-*Furman* statutory death penalty schemes and striking down two others, permitted the Court to evaluate the merits of appellate review.⁴¹⁴ The capital sentencing procedures of Georgia, Florida, and Texas passed constitutional muster largely because they provided the sentencing authority with guidelines

beyond which it is unreasonable and impracticable to compel [the legislature] to prescribe detailed rules . . .").

⁴⁰⁸ *McGautha*, 402 U.S. at 189-90, 207. Justice Brennan, in dissent, raised many objections to standardless capital sentencing procedures that would resurface in several of the *Furman* opinions. Justice Brennan insisted that "due process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary action may be reviewed or corrected." *Id.* at 270 (Brennan, J., dissenting). Justice Douglas, in a separate dissent, also noted that the lack of review compounded the constitutional deficiencies of standardless capital sentencing procedures. *Id.* at 247 (Douglas, J., dissenting).

⁴⁰⁹ See *supra* notes 70-188 and accompanying text.

⁴¹⁰ See *supra* notes 117, 136 and accompanying text.

⁴¹¹ See *supra* notes 116-17 and accompanying text.

⁴¹² See Comment, *supra* note 400, at 512 n.139 (citing *Beck v. Alabama*, 447 U.S. 625 (1980) (jury must be permitted to consider lesser included noncapital offense in deciding guilt of capital defendant; note 14 of the opinion explicitly limits it to capital cases); *Gardner v. Florida*, 430 U.S. 349 (1977) (Court vacated defendant's capital sentence due to his inability to confront all information contained in the presentence report submitted to trial judge); *Hopt v. Utah*, 110 U.S. 574 (1884) (requiring capital defendant's presence at sentencing hearing)).

⁴¹³ See *supra* notes 189-363 and accompanying text.

⁴¹⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana* (S. Roberts), 428 U.S. 325 (1976). For a more thorough discussion of these cases, see *supra* notes 102-42 and accompanying text.

aimed at controlling the exercise of discretion,⁴¹⁵ but the plurality of Justices Stewart, Powell, and Stevens repeatedly emphasized that appellate review was "an important additional safeguard."⁴¹⁶ In *Gregg*, Justice Stewart observed that "[w]here the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review . . . ensure[s] that death sentences are not imposed capriciously or in a freakish manner."⁴¹⁷ Similarly, Justice White, in a concurring opinion, declared that if the Georgia Supreme Court fulfilled its statutory duty under the Georgia law,⁴¹⁸ "death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside."⁴¹⁹ In addition, in upholding Texas's capital sentencing scheme in *Jurek v. Texas*,⁴²⁰ the plurality asserted that "[b]y providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law."⁴²¹

The plurality in *Woodson v. North Carolina*⁴²² and *Roberts v. Louisiana*

⁴¹⁵ See *supra* notes 117-18 and accompanying text.

⁴¹⁶ *Gregg*, 428 U.S. at 198, 206 (plurality opinion); see also *Proffitt*, 428 U.S. at 253, 258-60 (plurality opinion); *Jurek*, 428 U.S. at 276 (plurality opinion); *Woodson*, 428 U.S. at 303 (plurality opinion); *S. Roberts*, 428 U.S. at 335 (plurality opinion).

⁴¹⁷ *Gregg*, 428 U.S. at 195 (plurality opinion). In *Zant v. Stephens*, 103 S. Ct. 2733 (1983), discussed *supra* notes 208-78 and accompanying text, the Court reviewed *Gregg*, and suggested that the eighth amendment requires appellate review of death sentences. Justice Stevens, writing for the majority, observed that

[t]he [*Gregg*] plurality's approval of Georgia's capital sentencing procedure rested primarily on two features of the scheme: that the jury was required to find at least one valid statutory aggravating circumstance and to identify it in writing, and that the state supreme court reviewed the record of every death penalty proceeding to determine whether the sentence was arbitrary or disproportionate. These [two] elements, the [*Gregg*] opinion concluded, adequately protected against the wanton and freakish imposition of the death penalty.

Id. at 2742 (footnote omitted).

⁴¹⁸ The statute approved in *Gregg* requires, inter alia, that the Georgia Supreme Court, in reviewing death sentences, shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance . . . and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

GA. CODE § 17-10-35(c) (1982). The statutes upheld in *Proffitt* and *Jurek* both require appellate review of death sentences, but neither statute provides standards for such review. See FLA. STAT. ANN. § 921.141(4) (West Supp. 1983); TEX. CODE CRIM. PROC. ANN. art. 37.071(f) (Vernon 1981).

⁴¹⁹ *Gregg*, 428 U.S. at 224 (White, J., concurring). Chief Justice Burger and Justice Rehnquist joined Justice White's concurring opinion in *Gregg*.

⁴²⁰ 428 U.S. 262 (1976) (plurality opinion).

⁴²¹ *Id.* at 276.

⁴²² 428 U.S. 280 (1976).

(*S. Roberts*)⁴²³ also invalidated the death penalty statutes of North Carolina and Louisiana partly because of their lack of appellate review provisions.⁴²⁴ In *Woodson*, the plurality held that the North Carolina statute was unconstitutional because it lacked sentencing guidelines, and because it provided "no way . . . for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences."⁴²⁵ Similarly, the plurality declared in *S. Roberts* that "[t]he Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's *de facto* sentencing discretion."⁴²⁶ In *Gregg*, *Proffitt*, *Jurek*, *Woodson*, and *S. Roberts*, therefore, the plurality opinions implicitly recognized that meaningful appellate review provides an element of fairness and consistency in capital sentencing that legislative sentencing guidelines cannot supply.⁴²⁷

The Court's decision in *Godfrey v. Georgia*⁴²⁸ reemphasized the importance of appellate review of death sentences. The Georgia Supreme Court, in affirming Godfrey's death sentence, agreed with the jury's finding, as a statutory aggravating circumstance,⁴²⁹ that his crime was "outrageously or wantonly vile, horrible [and] inhuman" in nature.⁴³⁰ The United States Supreme Court reversed the sentence, holding that the Georgia Supreme Court had applied the statutory language too broadly, in conflict with its own prior efforts to narrowly construe the statute.⁴³¹ In approving the narrowing function of appellate review,⁴³²

⁴²³ 428 U.S. 325 (1976).

⁴²⁴ *Woodson*, 428 U.S. at 303 (plurality opinion); *S. Roberts*, 428 U.S. at 335 (plurality opinion).

⁴²⁵ *Woodson*, 428 U.S. at 303 (footnote omitted).

⁴²⁶ *S. Roberts*, 428 U.S. at 335 (citation omitted).

⁴²⁷ In *Harris v. Pulley*, 692 F.2d 1189 (9th Cir. 1982) (per curiam), *rev'd*, 104 S. Ct. 871 (1984), the Ninth Circuit interpreted *Gregg* as requiring the states' highest courts to perform comparative proportionality review of all death sentences. *Id.* at 1196. In *Harris*, the court of appeals vacated the federal district court's denial of the defendant's habeas corpus petition, ordering the district court to vacate the death sentence unless the California Supreme Court undertook comparative proportionality review within 120 days. *Id.* at 1192. Although such a position is consistent with the conclusions reached in this Project, the Ninth Circuit's analysis lacked substance. First, the opinion correctly noted that "[a] plurality of the . . . Supreme Court has approved proportionality review whether [it] is provided by statute [as in *Gregg*] or by case law [as in *Proffitt*]." *Id.* at 1196. Nevertheless, the opinion then makes the unsupported statement that *Gregg* and *Proffitt* "required" such review. *Id.* But see *supra* notes 404-26 and accompanying text. For a fuller discussion of *Harris*, see *infra* notes 436-68 and accompanying text.

⁴²⁸ 446 U.S. 420 (1980) (plurality opinion).

⁴²⁹ See GA. CODE § 17-10-35(c)(2) (1982) (referring to the statutory aggravating circumstances in § 17-10-30(b)).

⁴³⁰ *Godfrey v. State*, 243 Ga. 302, 310, 253 S.E.2d 710, 718 (1979) (quoting GA. CODE § 17-10-30(b)(7) (1982)). Godfrey had shot both his wife and mother-in-law in the head, killing them instantly. 446 U.S. at 425.

⁴³¹ *Godfrey*, 446 U.S. at 431-33 (plurality opinion). The Georgia Supreme Court had previously interpreted this aggravating circumstance as requiring that the killer's actions indi-

the Court again implicitly recognized the importance of such review to a constitutional capital sentencing scheme.⁴³³

Although these decisions strongly support the use of comparative proportionality review, and appellate review in general, as means of minimizing capital sentencing errors, the Supreme Court recently held in *Pulley v. Harris*⁴³⁴ that the eighth amendment does not require comparative proportionality review of death sentences.⁴³⁵

3. *Pulley v. Harris*

After a California jury convicted Robert Alton Harris of the kidnapping, robbery, and first degree murder of two teenage boys, Harris was sentenced to death in a separate sentencing proceeding.⁴³⁶ The California Supreme Court, pursuant to the state's death penalty statute,⁴³⁷ reviewed and affirmed Harris's sentence.⁴³⁸ After petitioning unsuccessfully for a writ of habeas corpus from the state court and a writ of certiorari from the United States Supreme Court, Harris sought habeas corpus relief in federal district court.⁴³⁹ The district court judge denied his petition, rejecting Harris's claim that the California Supreme Court violated his eighth and fourteenth amendment rights by failing to provide for comparative proportionality review of his death sentence.⁴⁴⁰ On appeal,⁴⁴¹ the Ninth Circuit held that the eighth amendment required comparative proportionality review of death sentences, and va-

cate a "depravity of mind," as evidenced by torture or serious physical abuse of the victim before death. *Id.* at 429-31 (citing *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977); *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976)).

⁴³² For a discussion of the narrowing function of appellate review, see *supra* notes 388-91 and accompanying text.

⁴³³ One commentator maintains that societal interests in the eighth amendment protections afforded by post-sentencing appellate review of death sentences are so great that courts should not permit capital defendants to waive such review. See Comment, *supra* note 400, at 524 ("Since appellate review of capital sentences is necessary to carry out the requirements of the eighth amendment, it should be considered inalienable."); accord *Gilmore v. Utah*, 429 U.S. 1012, 1018-19 (1976) (White, J., joined by Brennan & Marshall, JJ., dissenting from termination of stay of execution) (condemned person's consent does not authorize constitutionally questionable imposition of death penalty); *Lenhard v. Wolff*, 444 U.S. 807, 810 (1979) (Marshall, J., dissenting) (same). But see *Lenhard v. Wolff*, 444 U.S. 807 (1979) (majority opinion) (denying application for stay of execution where condemned person consents); *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (majority opinion) (terminating stay of execution; recognizing condemned person's waiver of federal rights).

⁴³⁴ 104 S. Ct. 871 (1984).

⁴³⁵ *Id.* at 879-80.

⁴³⁶ *Harris*, 104 S. Ct. at 871 & n.1.

⁴³⁷ CAL. PENAL CODE §§ 190.4(e) (West Supp. 1984) & 1239(b) (West 1982 & Supp. 1984) require automatic appeal of death sentences, but provide no standards for the California Supreme Court's review of such sentences.

⁴³⁸ *People v. Harris*, 28 Cal. 3d 935, 964, 623 P.2d 240, 256, 171 Cal. Rptr. 679, 695 (1981).

⁴³⁹ *Harris*, 104 S. Ct. at 874.

⁴⁴⁰ *Id.*

⁴⁴¹ *Harris* was able to appeal the district court's denial of his habeas corpus petition

cated the district court's denial of Harris's habeas corpus petition.⁴⁴²

The Supreme Court granted certiorari⁴⁴³ and reversed.⁴⁴⁴ Justice White, writing for the majority, reviewed earlier discussions of the importance of appellate review in *Gregg v. Georgia*,⁴⁴⁵ *Proffitt v. Florida*,⁴⁴⁶ and *Jurek v. Texas*.⁴⁴⁷ The Court recognized that the *Gregg* plurality "suggested that some form of meaningful appellate review is required,"⁴⁴⁸ and conceded that the *Proffitt* and *Jurek* plurality opinions also noted the importance of such review.⁴⁴⁹ The Court, however, found that these cases did "not establish proportionality review as a constitutional requirement."⁴⁵⁰ In particular, the Court noted that the *Jurek* Court upheld a capital sentencing scheme "even though neither the statute, . . . nor state case-law, . . . provided for comparative proportionality review."⁴⁵¹ Satisfied that the Court had not found such review to be constitutionally required in these earlier cases, the *Harris* majority chose not to inquire further into the merits of comparative proportionality review.⁴⁵²

Although the *Harris* majority opinion did not expressly determine whether the eighth amendment requires appellate review of death

because the court issued a certificate of probable cause pursuant to 28 U.S.C. § 2253 (1976). For an explanation of this procedure, see *infra* note 480.

⁴⁴² *Harris v. Pulley*, 692 F.2d 1189, 1192 (9th Cir. 1982), *rev'd*, 104 S. Ct. 871 (1984). The court of appeals instructed the district court "to grant the petition relieving [Harris] from his sentence of death unless the California Supreme Court undertakes [proportionality review] within a reasonable time not to exceed 120 days from the date this order is filed . . ." *Id.*

⁴⁴³ *Harris v. Pulley*, 103 S. Ct. 1425 (1983). Justice White's dramatic last-minute grant of Texas defendant James Autry's application for a stay of execution in *Autry v. Estelle*, 104 S. Ct. 24 (1983), pending the Court's decision in *Harris*, heightened the significance of the Court's decision as to whether the Constitution requires comparative proportionality review. Autry was executed on March 13, 1984. See N.Y. Times, Mar. 15, 1984, at A27, col. 1.

⁴⁴⁴ 104 S. Ct. 871 (1984). Justice Stevens filed an opinion concurring in part and concurring in the judgment. Justice Brennan filed a dissenting opinion in which Justice Marshall joined.

⁴⁴⁵ 428 U.S. 153 (1976) (plurality opinion).

⁴⁴⁶ 428 U.S. 242 (1976) (plurality opinion).

⁴⁴⁷ 428 U.S. 262 (1976) (plurality opinion). For a discussion of the Court's references to appellate review in these cases, see *supra* notes 414-21 and accompanying text.

⁴⁴⁸ *Harris*, 104 S. Ct. at 877 (citing *Gregg*, 428 U.S. at 198, 204-06 (plurality opinion)).

⁴⁴⁹ 104 S. Ct. at 877-79 (citing *Proffitt*, 428 U.S. at 250-51 (plurality opinion); *Jurek*, 428 U.S. at 276 (plurality opinion)).

⁴⁵⁰ *Harris*, 104 S. Ct. at 876.

⁴⁵¹ *Id.* at 878. Justice White also stated that "[i]n view of *Jurek*, we are quite sure that at that juncture the Court had not mandated comparative proportionality review [of every] death sentence . . ." *Id.* at 879. In addition, Justice White reviewed the Court's declaration in *Zant v. Stephens*, 103 S. Ct. 2733 (1983), that meaningful appellate review is one of "two important features" that "guide and channel the exercise of discretion" in death penalty cases. *Zant*, 103 U.S. at 2741. He concluded that *Zant* "did not hold that comparative review was constitutionally required." *Harris*, 104 S. Ct. at 879.

⁴⁵² After discussing prior case law, the *Harris* Court examined California's death penalty scheme, concluding that it guaranteed sufficient fairness and consistency in capital sentencing. 104 S. Ct. at 880-81. For an analysis of the Court's conclusions, see *infra* text accompanying notes 453-68.

sentences,⁴⁵³ Justice Stevens asserted that *Gregg*, *Proffitt*, and *Jurek* did establish a constitutional requirement of "some form of meaningful appellate review" of death sentences.⁴⁵⁴ Nevertheless, Justice Stevens concurred in the judgment that comparative proportionality review is not constitutionally necessary in capital cases, noting that he was "not persuaded" that such review was the only method by which appellate courts could perform "meaningful" appellate review.⁴⁵⁵

Even if the plurality opinions in *Gregg*, *Proffitt*, and *Jurek* did not establish a constitutional requirement of comparative or other appellate review of death sentences, lack of precedent alone cannot justify the Supreme Court's decision in *Harris*.⁴⁵⁶ Although the *Harris* Court reviewed earlier capital sentencing decisions, it failed to discuss the relative merits of comparative proportionality review. Because post-sentencing appellate review provides a valuable check on unfair or inconsistent capital sentencing that statutory guidelines cannot supply,⁴⁵⁷ analysis of such review illustrates its particular importance to a constitutionally permissible capital sentencing scheme.

The widespread use and proven effectiveness of comparative proportionality review confirms that comparison of a condemned person's sentence with sentences imposed on others convicted of similar crimes is the most logical means of ensuring consistent state-wide enforcement of a death penalty statute.⁴⁵⁸ Thirty-one of thirty-seven states currently permitting the imposition of the death penalty provide for such review.⁴⁵⁹ Comparative proportionality review has led the Georgia Supreme Court to vacate death sentences in at least seven cases since 1974.⁴⁶⁰ Comparative proportionality review has produced similar results in other states.⁴⁶¹ The frequency and irrevocability of capital sentencing errors justify the moderate judicial resources necessary to

⁴⁵³ The *Harris* Court conceded that the *Gregg* plurality had "suggested" a need for some form of appellate review. See *supra* note 448 and accompanying text. The *Harris* Court thus may have implicitly recognized a general need for such review.

⁴⁵⁴ *Harris*, 104 S. Ct. at 884 (Stevens, J., concurring in part and concurring in the judgment). Stevens added that in *Zant v. Stephens*, 103 S. Ct. 2733 (1983), the Court deemed appellate review of the sentencing decision to be essential to upholding the jury's application of Georgia's death penalty statute. *Harris*, 104 S. Ct. at 884.

⁴⁵⁵ 104 S. Ct. at 884 (Stevens, J., concurring in part and concurring in the judgment).

⁴⁵⁶ Indeed, the Court has reached other major capital punishment decisions without the benefit of precedent. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976) (mandatory death sentences constitute cruel and unusual punishment); *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (arbitrary and capricious imposition of death penalty constitutes cruel and unusual punishment).

⁴⁵⁷ See *supra* notes 414-33 and accompanying text.

⁴⁵⁸ See *Harris*, 104 S. Ct. at 890 (Brennan, J., dissenting) (comparative proportionality review is "the most logical way to identify [capital] sentencing disparities . . .").

⁴⁵⁹ See *supra* note 382; see also *infra* notes 747-52 and accompanying text.

⁴⁶⁰ *Harris*, 104 S. Ct. at 890-91 (Brennan, J., dissenting) (citing these cases).

⁴⁶¹ *Id.* at 891 (citing cases).

administer such review.⁴⁶²

The *Harris* decision has only a limited immediate effect: it will hasten executions in Texas and California, the only two states with significant death row populations that do not provide comparative proportionality review of death sentences.⁴⁶³ Nevertheless, *Harris*, like *Furman*,⁴⁶⁴ failed to resolve the issue of whether the eighth amendment requires some form of meaningful appellate review of death sentences,⁴⁶⁵ once again leaving state legislatures without guidance. Moreover, states that now require comparative proportionality review may begin to relax or eliminate such review in light of *Harris*'s holding that such review is not constitutionally required.⁴⁶⁶ Such a trend would create a greater likelihood of unfairness and inconsistency in capital sentencing because comparative proportionality review provides the best means of detecting abuses of discretion in sentencing.⁴⁶⁷ Justice White's assertion that no capital sentencing scheme is perfect⁴⁶⁸ cannot explain the Court's failure to insist on the *best* scheme available for minimizing constitutional errors in cases in which life is at stake.

B. The Collateral Review of Federal Habeas Corpus

1. *Federal Habeas Corpus in Capital Cases*

In 1948, Congress codified the right to apply to a federal court for a writ of habeas corpus as a means of relief from state custody.⁴⁶⁹ The writ of habeas corpus historically was a fundamental element of due process of law,⁴⁷⁰ created to guarantee freedom from unlawful executive

⁴⁶² Justice Brennan, dissenting in *Harris*, asserted that comparative proportionality review serves to eliminate some, if only a small part, of the irrationality that currently infects imposition of the death penalty by the various states. Before any execution is carried out, therefore, a state should be required under the eighth and fourteenth Amendments to conduct such appellate review. *Id.*

⁴⁶³ See *id.* at 876 (majority opinion). For a discussion of the states that do require comparative proportionality review, see *infra* notes 747-52 and accompanying text.

⁴⁶⁴ See *supra* notes 75-87 and accompanying text.

⁴⁶⁵ See *supra* note 453 and accompanying text.

⁴⁶⁶ See *supra* notes 450-52 and accompanying text.

⁴⁶⁷ See *supra* notes 457-62 and accompanying text.

⁴⁶⁸ *Harris*, 104 S. Ct. at 881 (citations omitted).

⁴⁶⁹ 28 U.S.C. § 2254(a) (1976). Section 2254(a) provides that

[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Prior to enactment of § 2254, federal case law provided for the right to apply for a writ of habeas corpus. See *Rose v. Lundy*, 455 U.S. 509, 516 n.8 (1982).

⁴⁷⁰ See *Fay v. Noia*, 372 U.S. 391, 399-409 (1963). The Court declared that "[the] root principle [of habeas corpus] is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Id.* at 402.

detentions. As codified by Congress, the federal writ serves as a form of collateral review of state court judgments by federal courts, permitting the federal judiciary to supervise state adjudication of federal claims and protect constitutional guarantees.⁴⁷¹ Moreover, federal district courts, acting as the Supreme Court's designees,⁴⁷² use the writ to promote uniformity in the administration of due process guarantees.⁴⁷³

The employment of the writ as a form of collateral review, however, enjoys less support than its use as a means of relief from pretrial custody.⁴⁷⁴ The Supreme Court has emphasized that "direct appeal is the primary avenue for review of a conviction or sentence,"⁴⁷⁵ and that "[t]he role of federal habeas proceedings . . . is secondary and limited."⁴⁷⁶ Thus, "[w]hen the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence."⁴⁷⁷

The constitutional protections afforded by federal habeas corpus are most needed in death penalty cases.⁴⁷⁸ Consequently, despite the presumption of finality attributed to a criminal conviction once the defendant has exhausted all avenues of direct appeal, federal courts reviewing post-conviction petitions for habeas corpus are "particularly sensitive to comprehensive and careful review of death penalty cases."⁴⁷⁹ For example, in discussing the issuance of a certificate of probable cause, which permits appeal of a federal district court's denial of an applica-

⁴⁷¹ One critic suggests that life-tenured federal judges are more likely to protect the constitutional rights of the accused than elected state judges, because the former need not respond to public indignation at rising crime rates. See Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609, 616 (1983); cf. Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 OHIO ST. L.J. 367 (1983).

⁴⁷² See Olsen, *Judicial Proposals to Limit the Jurisdictional Scope of Federal Post-Conviction Habeas Corpus Consideration of the Claims of State Prisoners*, 31 BUFFALO L. REV. 301, 307-08 (1982). Because the Supreme Court's certiorari jurisdiction cannot encompass all state criminal cases in which defendants raise federal issues, the federal district courts must handle federal habeas corpus petitions in order to guarantee a federal judicial forum for review of these issues. *Id.* at 311. Professor Olsen argues that "[t]he Supreme Court's certiorari jurisdiction cannot accomplish this function since that Court does not, and cannot, review convictions merely for error." *Id.* (emphasis in original) (footnote omitted).

⁴⁷³ Yackle, *supra* note 471, at 617.

⁴⁷⁴ Yackle, *supra* note 471, at 609-10; see *infra* note 487 and accompanying text.

⁴⁷⁵ Barefoot v. Estelle, 103 S. Ct. 3383, 3391 (1983).

⁴⁷⁶ *Id.*; see also Sumner v. Mata, 449 U.S. 539, 543 n.3 (1981) (recognizing "limited nature" of review provided by federal habeas corpus).

⁴⁷⁷ Barefoot v. Estelle, 103 S. Ct. 3383, 3391 (1983); accord 28 U.S.C. § 2254(d) (1976).

⁴⁷⁸ See *supra* notes 400-02 and accompanying text. In addition to the heightened appellate vigilance required by the eighth amendment to permit the lawful imposition of a death sentence, the due process clause itself demands greater protection of the rights of defendants in capital cases. See McGautha v. California, 402 U.S. 183, 309 (1971) (Brennan, J., dissenting) ("the degree of procedural regularity required by the Due Process Clause increases with the importance of the interests at stake"); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

⁴⁷⁹ Olsen, *supra* note 472, at 338 n.193.

tion for a writ of habeas corpus,⁴⁸⁰ the Supreme Court has acknowledged that "the nature of the [death] penalty is a proper consideration in determining whether to issue a certificate of probable cause."⁴⁸¹ Judicial sensitivity to the death penalty has produced startling results: courts of appeals have uncovered constitutional deficiencies and set aside death sentences in sixty-seven percent of the capital cases in which they have heard the merits of a defendant's federal habeas corpus appeal.⁴⁸² Federal habeas corpus thus affords significant and valuable protection of the constitutional rights of condemned persons.

2. *The Debate Over Federal Habeas Corpus Reform*

In recent years, the debate over the merits of federal habeas corpus has intensified.⁴⁸³ The attack on the present scope of federal habeas corpus stresses three points:

- (1) federal habeas corpus strains the principles of federalism;⁴⁸⁴
- (2) federal habeas corpus suffers from "progressive trivialization"⁴⁸⁵ through overuse, imposing an unjustifiable burden on judicial resources; and
- (3) federal habeas corpus causes judicial delays that undermine finality in criminal proceedings.⁴⁸⁶

Critics have offered a battery of proposals for limiting the scope of fed-

⁴⁸⁰ If a federal district court denies an application for a writ of habeas corpus, 28 U.S.C. § 2253 (1976) provides that

[a]n appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

Congress imposed this limitation "to prevent frivolous appeals from delaying the States' ability to impose sentences." *Barefoot*, 103 S. Ct. at 3393. In applying § 2253, the federal courts have generally refused to issue a certificate of probable cause unless the petitioner makes a "substantial showing of the denial of [a] federal right." *Id.* at 3394 (quoting *Stewart v. Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972)). The federal district courts therefore dismiss most habeas corpus applications without a certificate of probable cause. See Olsen, *supra* note 472, at 309. If the district court or court of appeals issues that certificate, the court of appeals must entertain and decide the appellant's appeal on the merits. *Barefoot*, 103 S. Ct. at 3394; *accord* *Garrison v. Patterson*, 391 U.S. 464, 466 (1968) (per curiam).

⁴⁸¹ *Barefoot*, 103 S. Ct. at 3394. The Court, however, cautioned that "the severity of the [death] penalty does not in itself suffice to warrant the automatic issuing of a certificate." *Id.* But see *Jurek v. Estelle*, 450 U.S. 1014, 1019 (1981) (Rehnquist, J., dissenting from denial of certiorari) ("[t]he severity of a defendant's punishment . . . simply has no bearing on . . . the extent to which federal habeas courts should defer to state court findings").

⁴⁸² See *Barefoot*, 103 S. Ct. at 3405 (Marshall, J., dissenting) (citing Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc., at 1e-6e); see *infra* notes 546-51 and accompanying text.

⁴⁸³ Allen, Schachtman & Wilson, *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 675-76 (1982); see *infra* notes 487-92 and accompanying text.

⁴⁸⁴ Olsen, *supra* note 472, at 305.

⁴⁸⁵ *Brown v. Allen*, 344 U.S. 443, 536 (1953) (Jackson, J., concurring).

⁴⁸⁶ See Olsen, *supra* note 472, at 305.

eral habeas corpus, somewhat tarnishing the luster of the Great Writ.⁴⁸⁷ These same proposals have sparked an equally vehement defense of habeas corpus.⁴⁸⁸ Judges,⁴⁸⁹ legislators,⁴⁹⁰ and legal scholars⁴⁹¹ have joined both sides of the debate.⁴⁹²

The Supreme Court has also played an active role in this controversy.⁴⁹³ Several members of the Court have recently exhibited an intolerance for procedural delays attributable to federal habeas corpus proceedings.⁴⁹⁴ Ironically, the Court's discontent has been most conspicuous in capital cases, where detailed procedural safeguards are particularly justifiable.⁴⁹⁵ For example, the Court's impatience with execution delays caused by habeas corpus is particularly apparent in *Barefoot v. Estelle*.⁴⁹⁶

⁴⁸⁷ See Meador, *Straightening Out Federal Review of State Criminal Cases*, 44 OHIO ST. L.J. 273 (1983); Smith, *Federal Habeas Corpus—A Need for Reform*, 73 J. CRIM. L. & CRIMINOLOGY 1036 (1982); Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?*, 21 DE PAUL L. REV. 740 (1972).

⁴⁸⁸ See, e.g., Olsen, *supra* note 472; Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982); Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393 (1983) [hereinafter cited as Yackle, *The Exhaustion Doctrine*]; Yackle, *supra* note 471.

⁴⁸⁹ See, e.g., Hooper, *Habeas Corpus Under 28 U.S.C. Section 2254—Bane or Blessing*, 9 CUM. L. REV. 391 (1978) (federal district court judge); O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981) (Justice O'Connor, as Arizona Court of Appeals judge); Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337 (1983) (federal court of appeals judge); see also Olsen, *supra* note 472 (analyzing various judges' positions concerning reform of habeas corpus).

⁴⁹⁰ See, e.g., S. 217, 98th Cong., 1st Sess. (1983); S. 2216, 97th Cong., 2d Sess. (1982); H.R. 6050, 97th Cong., 2d Sess. (1982); see also Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287, 292-96 (1983) (discussing recent legislative proposals for federal habeas corpus reform).

⁴⁹¹ See, e.g., P. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS (1979); Allen, Schachtman & Wilson, *supra* note 483; Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Corpus*, 64 IOWA L. REV. 233 (1979); Remington, *supra* note 490; Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 OHIO ST. L.J. 307 (1983); Saltzburg, *supra* note 471; Weick, *supra* note 487.

⁴⁹² The Reagan Administration has added its own set of proposals for federal habeas corpus reform. See ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, U.S. DEP'T OF JUST., FINAL REPORT 58-60 (1981); see also Yackle, *supra* note 471.

⁴⁹³ See, e.g., *Barefoot v. Estelle*, 103 S. Ct. 3383, 3394 (1983) (permitting courts of appeals to "adopt expedited procedures in resolving the merits of habeas appeals") (discussed *infra* notes 497-521 and accompanying text); *Rose v. Lundy*, 455 U.S. 509 (1982) (district courts must dismiss habeas corpus petitions containing one unexhausted claim regardless of the number of exhausted claims legitimately presented) (discussed *infra* notes 534-36 and accompanying text); *Stone v. Powell*, 428 U.S. 465 (1976) (fourth amendment exclusion claims unreviewable on application for writ of habeas corpus where defendant afforded an opportunity for "full and fair" state court consideration).

⁴⁹⁴ See *infra* notes 557-59 and accompanying text.

⁴⁹⁵ Capital sentencing proceedings merit greater procedural protection of constitutional rights because an execution cannot be reversed once the state has carried it out.

⁴⁹⁶ 103 S. Ct. 3383 (1983). One can find further evidence of the Court's impatience with execution delays caused by habeas corpus in the rhetoric of individual Justices' statements

3. Barefoot v. Estelle

In 1978, a Texas jury found Thomas Barefoot guilty of murdering a police officer⁴⁹⁷ and sentenced him to death in a separate sentencing proceeding,⁴⁹⁸ as required by Texas law.⁴⁹⁹ The Texas Court of Criminal Appeals affirmed Barefoot's conviction,⁵⁰⁰ and later denied two applications for habeas corpus.⁵⁰¹ Barefoot then sought a writ of habeas corpus from the federal district court, claiming that the state trial judge had violated Barefoot's eighth and fourteenth amendment rights by permitting the introduction of psychiatric testimony at the sentencing stage to assess Barefoot's future dangerousness.⁵⁰²

The district court denied Barefoot's application, but issued a certificate of probable cause,⁵⁰³ permitting him to appeal to the Court of Appeals for the Fifth Circuit.⁵⁰⁴ This certificate guaranteed Barefoot appellate review of the merits of his application for habeas corpus.⁵⁰⁵ Barefoot subsequently asked the court of appeals to stay his execution, which was scheduled for January 25, 1983.⁵⁰⁶ The court of appeals heard Barefoot's appeal on January 19, 1983, allowing his counsel unlimited time at oral argument to discuss any relevant issue.⁵⁰⁷ The following day, the court of appeals denied Barefoot's application for a stay of execution, discussing but not deciding the merits of his application for habeas corpus.⁵⁰⁸ On January 24, 1983, the day before Barefoot's scheduled execution, the Supreme Court granted a stay of execution and issued a writ of certiorari,⁵⁰⁹ agreeing to hear argument on Barefoot's claims that (1) the introduction of psychiatric testimony concerning his future dangerousness violated his eighth and fourteenth amendment rights and (2) the court of appeals denied him the right to full appellate

appended to recent denials of applications for stays of execution and petitions for certiorari. See *infra* note 559 and accompanying text.

⁴⁹⁷ Barefoot v. Estelle, 103 S. Ct. 3383, 3389 (1983).

⁴⁹⁸ *Id.*

⁴⁹⁹ TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon 1981).

⁵⁰⁰ Barefoot v. State, 596 S.W.2d 875 (Tex. Crim. App. 1980) (en banc), *cert. denied*, 453 U.S. 913 (1981).

⁵⁰¹ See *Barefoot*, 103 S. Ct. at 3390.

⁵⁰² *Id.* at 3390. The American Psychiatric Association concluded that two out of three psychiatric predictions of future dangerousness are wrong. *Id.* at 3408 (Blackmun, J., dissenting) (citing Brief for Amicus Curiae American Psychiatric Association at 9, 13). This conclusion supports Barefoot's assertion that such testimony is too unreliable to use at a capital sentencing proceeding. See *infra* note 512.

⁵⁰³ 103 S. Ct. at 3390. For an explanation of the certificate of probable cause, see *supra* note 480. See generally Robbins, *supra* note 491.

⁵⁰⁴ 103 S. Ct. at 3390.

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ Barefoot v. Estelle, 697 F.2d 593, 595 (5th Cir.) (per curiam), *aff'd*, 103 S. Ct. 3383 (1983).

⁵⁰⁸ *Id.* at 600.

⁵⁰⁹ 459 U.S. 1169 (1983).

review of the merits of his application for habeas corpus.⁵¹⁰

The Supreme Court affirmed the district court's denial of Barefoot's application for a writ of habeas corpus.⁵¹¹ The Court held that psychiatric testimony is admissible at a capital sentencing proceeding⁵¹² and concluded that the Fifth Circuit did not violate Barefoot's constitutional rights by denying his application for a stay without issuing a formal ruling on his appeal from denial of habeas corpus.⁵¹³

Justice White, writing for the majority, recognized that issuing a certificate of probable cause guarantees a full appellate review of the merits of the defendant's application for habeas corpus.⁵¹⁴ In addition, the Court acknowledged that "if a court of appeals is unable to resolve the merits of an appeal before the scheduled date of execution, the petitioner is entitled to a stay of execution to permit due consideration of the merits."⁵¹⁵ In assessing the Fifth Circuit's denial of Barefoot's application for a stay of execution, and its failure to rule expressly on the merits of Barefoot's habeas appeal, the Court concluded that the court of appeals had fully considered the merits of Barefoot's appeal simultaneously with his application for a stay.⁵¹⁶ Although the Court acknowl-

⁵¹⁰ For a discussion of the procedure used by appellate courts in reviewing a denial of habeas corpus, see *supra* note 480.

⁵¹¹ 103 S. Ct. at 3400.

⁵¹² *Id.* Despite the American Psychiatric Association's assertion in its amicus brief that psychiatric testimony concerning the future dangerousness of a defendant was unreliable, see *id.* at 3408-09 (Blackmun, J., dissenting), the Court approved the use of such psychiatric testimony at the sentencing stage, even where the experts testifying had not personally examined the defendant. *Id.* at 3399. The Court based this conclusion on its belief that juries could "separate the wheat from the chaff." *Id.* at 3398 n.7.

In his dissent, Justice Blackmun questioned whether juries, inexperienced in criminal and psychiatric matters, are capable of second-guessing experts who themselves are wrong more often than not. *Id.* at 3413 (Blackmun, J., dissenting). Moreover, Blackmun noted that psychiatric testimony could be potentially prejudicial because of the "'aura of scientific infallibility'" surrounding that testimony. *Id.* at 3411 (quoting Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half-Century Later*, 80 COLUM. L. REV. 1197, 1237 (1980)). The Court's receptiveness to the admission of potentially erroneous expert testimony in capital sentencing proceedings belies the Court's professed dedication to fairness and consistency in death penalty cases. See *The Supreme Court, 1982 Term, supra* note 394, at 121.

⁵¹³ *Barefoot*, 103 S. Ct. at 3393.

⁵¹⁴ *Id.* at 3392 (citations omitted).

⁵¹⁵ *Id.*

⁵¹⁶ *Id.* There are two possible explanations for the Fifth Circuit's actions in *Barefoot*: either the court of appeals fully considered the merits of Barefoot's appeal simultaneously with his application for a stay, or it followed its prior practice of requiring a capital defendant to make "a showing of some prospect of success on the merits" of his appeal as a condition precedent to issuing a stay of execution. *Id.* (citing, as examples of the Fifth Circuit's practice, *Brooks v. Estelle*, 697 F.2d 586, 590 (5th Cir. 1982); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982)).

The Court admitted that requiring a showing of some prospect of success on the merits before issuance of a stay of execution might prevent constitutionally sufficient review of a capital defendant's application for habeas corpus. *Barefoot*, 103 S. Ct. at 3392. The court of appeals' failure to issue an express ruling on the merits of Barefoot's appeal suggests that the court required such a preliminary showing, and may not have fully considered the merits of

edged that expressly affirming the district court's judgment would have been "advisable,"⁵¹⁷ it concluded that the court of appeals had clearly and effectively ruled on the merits of Barefoot's appeal in denying his application for a stay.⁵¹⁸ The Court thus found the practice of simultaneously considering the merits of a habeas corpus appeal and an application for a stay of execution constitutionally permissible,⁵¹⁹ concluding that a remand to the Fifth Circuit merely to affirm the district court's judgment would be "an unwarranted exaltation of form over substance."⁵²⁰

The Court in *Barefoot* then issued a set of guidelines to help lower federal courts cope with the "increasing number of death-sentenced petitioners [that] are entering the appellate stages of the federal habeas process."⁵²¹ In large part, these guidelines did not break new ground; nevertheless, they reflect the Court's new emphasis on reducing delays in executions at the expense of fairness and consistency in capital sentencing procedures, marking a disturbing departure from prior interpretations of the eighth amendment.

4. *In Defense of Collateral Review of Death Sentences*

The Court's third guideline in *Barefoot*, permitting the courts of ap-

Barefoot's appeal. The Supreme Court reached the opposite conclusion, however, and therefore refused to consider the constitutionality of requiring a preliminary showing for a stay of execution.

⁵¹⁷ 103 S. Ct. at 3393.

⁵¹⁸ *Id.* The court of appeals had stated that it found "no patent substantial merit, or semblance thereof, to [Barefoot's] constitutional objections." *Barefoot v. Estelle*, 697 F.2d 593, 600 (5th Cir. 1983).

⁵¹⁹ 103 S. Ct. at 3392-93. Justice White noted that the requirement of a decision on the merits "does not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of such cases." *Id.* at 3392 (quoting *Carafas v. LaVallee*, 391 U.S. 234, 242 (1968)). *See* *Garrison v. Patterson*, 391 U.S. 464, 466-67 (1968) (per curiam) (sanctioning simultaneous consideration of a request for a certificate of probable cause and the merits of the appeal).

⁵²⁰ *Barefoot*, 103 S. Ct. at 3393. The Court's conclusion that the Fifth Circuit had effectively ruled on the merits of Barefoot's appeal in denying his application for a stay of execution probably had little impact on the result of the case. The court of appeals, unimpressed with the substance of Barefoot's constitutional claims, almost certainly would have reached the same result even if it had considered the merits of Barefoot's appeal more extensively.

⁵²¹ *Id.* at 3393. The Court set forth five guidelines. First, the Court noted that the severity of the death penalty does not by itself justify issuing a certificate of probable cause, although courts may consider it in reviewing habeas applications. *Id.* at 3394. Second, the Court stated that circuit courts should grant a stay of execution where necessary to permit a decision on the merits of the appeal. *Id.* Third, the Court recognized that courts of appeals may adopt expedited procedures in death penalty cases to permit them to resolve the merits of an appeal from a denial of habeas corpus prior to the scheduled execution date. *Id.* at 3394-95. Fourth, the Court stated that federal courts should dismiss second or successive petitions that either fail to allege new grounds for relief or allege new grounds that the defendant should have included in an earlier petition. *Id.* at 3395. Finally, the Supreme Court warned that it would not automatically issue a stay of execution to consider a condemned person's petition for a writ of certiorari. *Id.*

peals to adopt expedited procedures in capital cases to resolve the merits of an appeal from a denial of habeas corpus prior to a scheduled execution date,⁵²² is the most worrisome of the *Barefoot* guidelines. The adoption of summary procedures by courts of appeals, and the very notion of "photo-finish" appellate review,⁵²³ would subjugate the goals of fairness and consistency to that of expediency in reviews of capital sentences.⁵²⁴ This sacrifice would conflict with the demands of the eighth amendment, particularly in view of the Court's new tolerance for sentencing discretion.⁵²⁵

The Court in *Barefoot* failed to give any reasons for its approval of expedited procedures in capital cases involving appeals from denials of habeas corpus,⁵²⁶ thus making the decision difficult to analyze. Commentators who advocate reform of habeas corpus generally articulate three complaints about federal corpus procedures: first, federal habeas corpus generates friction between federal and state courts;⁵²⁷ second, federal habeas corpus has placed a growing burden on federal judicial resources;⁵²⁸ and third, federal habeas corpus undermines the desire for finality in criminal proceedings.⁵²⁹ Because the Court probably relied on these arguments in formulating the *Barefoot* guidelines, an analysis of the Court's new restrained attitude toward the use of federal habeas corpus in death penalty cases must address each of these criticisms of federal habeas corpus.

a. *States' Rights and Capital Punishment*

Congress created federal habeas corpus "to furnish a method additional to and independent of direct Supreme Court review of state court

⁵²² *Id.* at 3394-95.

⁵²³ "Photo-finish" appellate review refers to the courts' attempts to complete expedited review of death sentences prior to scheduled execution dates.

⁵²⁴ Restriction of the judicial time and effort devoted to habeas corpus appeals will reduce detection of constitutionally significant capital sentencing errors. In recent years, courts of appeals have detected these errors in 67% of federal habeas corpus appeals. *See infra* notes 546-51 and accompanying text; *see also The Supreme Court, 1982 Term, supra* note 394, at 121 (in *Barefoot*, "the Court demonstrated . . . a new willingness to tolerate significant potential errors in capital sentencing").

⁵²⁵ For a discussion of this trend, *see supra* notes 150-363 and accompanying text.

⁵²⁶ Justice White, writing for the majority, relied heavily on three pre-*Furman* habeas decisions, only one of which involved the death penalty. *See Barefoot*, 103 S. Ct. at 3391-92 (citing *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (courts of appeals must permit appeal from denial of habeas corpus where district court issues a certificate of probable cause, even if state has released defendant); *Garrison v. Patterson*, 391 U.S. 464, 466 (1968) (per curiam) (court of appeals erred by denying condemned person the opportunity to address the merits of his appeal after granting certificate of probable cause); *Nowakowski v. Maroney*, 386 U.S. 542, 543 (1967) (per curiam) (where district court grants certificate of probable cause, court of appeals must permit appeal from a denial of habeas corpus)).

⁵²⁷ *See, e.g., Olsen, supra* note 472, at 305.

⁵²⁸ *Id.*

⁵²⁹ *Id.*

decisions for the vindication of . . . constitutional guarantees."⁵³⁰ The existence of this remedy inevitably conflicts with notions of state autonomy in criminal proceedings.⁵³¹ Although minimizing federal-state judicial friction is one concern of the Supreme Court, the Court has recognized that federal habeas corpus necessarily entails a certain amount of this friction.⁵³² Federal and state courts should be especially tolerant of such conflict in death penalty cases, because both federal and state governments have a vital interest in preserving the lives of their citizens.

The *Barefoot* decision, which focused primarily on federal appellate procedure, referred to states' rights only twice.⁵³³ Nevertheless, the Court may have based its approval of summary procedures for federal habeas corpus appeals in death penalty cases partly on each state's right to enforce its criminal sentences without undue delay. The Supreme Court has previously indicated the importance of this right. In *Rose v. Lundy*,⁵³⁴ a noncapital federal habeas corpus case, the Court held that the federal district courts must dismiss a habeas corpus petition that contains any unexhausted claim (one for which state avenues of relief still exist) regardless of the number of exhausted claims legitimately presented.⁵³⁵ Justice O'Connor asserted that this exhaustion require-

⁵³⁰ *Fay v. Noia*, 372 U.S. 391, 416 (1963).

⁵³¹ Congress sought to minimize federal interference with state criminal justice systems by creating in 28 U.S.C. § 2254(b), (c) (1982) an exhaustion requirement for federal habeas corpus:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

⁵³² *See Sumner v. Mata*, 449 U.S. 539, 550-52 (1981).

⁵³³ *See Barefoot*, 103 S. Ct. at 3391 ("[f]ederal courts are not forums in which to relitigate state trials"); *id.* at 3395 ("the State has a quite legitimate interest in preventing such abuses of the writ") (quoting Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc., at 41).

⁵³⁴ 455 U.S. 509 (1982).

⁵³⁵ *Id.* at 510 (plurality opinion). Although the Supreme Court's adoption of a rigid "total exhaustion" requirement was not inconsistent with the language of the federal habeas corpus statute, *see* 28 U.S.C. § 2254(b), (c) (1982), *supra* notes 469, 531, the Court rejected the Sixth Circuit's more flexible approach of allowing district courts to dismiss unexhausted claims raised in petitions for habeas corpus and proceed to the merits of the exhausted claims. The Sixth Circuit's approach eliminated the need for amendment or resubmission of petitions containing both exhausted and unexhausted claims. At the time of the Supreme Court's decision in *Lundy*, seven of the other circuit courts had adopted the Sixth Circuit's approach. *Lundy*, 455 U.S. at 513 n.5. For a fuller criticism of *Lundy*, see Yackle, *The Exhaustion Doctrine*, *supra* note 488, at 424-31; Note, *Federal Habeas Corpus: The Exhaustion Doctrine and Mixed Peti-*

ment prevents federal review of claims until after the state has had a full opportunity to adjudicate them, thus promoting judicial comity and protecting the state's right to convict and sentence its criminals without federal interference.⁵³⁶

State interests, however, cannot always prevail over the defendant's interest in meaningful enforcement of constitutional rights. The history of habeas corpus "is inextricably intertwined with the growth of fundamental rights of personal liberty."⁵³⁷ Habeas corpus provides its most significant protection when the taking of a life is at stake. Therefore, although restricting federal habeas corpus in the interests of insulating a state from undue federal interference may be proper when, as in *Lundy*, the defendant only faces a prison term,⁵³⁸ a restriction of federal habeas corpus in the interests of state autonomy is inappropriate where a defendant faces execution.⁵³⁹ In such a case, even if "the interest in imposing the death penalty is essentially a state interest,"⁵⁴⁰ federal courts have a compelling interest in ensuring that states impose the death penalty in a constitutionally permissible fashion.

b. *A Justifiable Use of Judicial Resources*

Because federal habeas corpus traditionally served as a "secondary and limited" remedy,⁵⁴¹ critics commonly assail its current availability, primarily on the ground that frivolous federal habeas corpus petitions undeservingly consume "precious and limited judicial resources."⁵⁴² Unquestionably, federal courts should devote judicial resources to their most productive uses. Productivity must be measured both quantitatively and qualitatively, however. Although expedited habeas corpus procedures arguably enable federal courts to handle a greater number of cases, such a quantitative increase would inevitably result in a qualitative reduction in reliability by requiring the federal courts to give less consideration to the merits of each case. In death penalty cases, this reduction may violate the eighth amendment's mandate of fairness and consistency in capital sentencing.⁵⁴³

tions—*Rose v. Lundy and "Exhaustion" Under the Illinois Post-Conviction Remedies*, 1983 U. ILL. L. REV. 515, 520-27.

⁵³⁶ *Lundy*, 455 U.S. at 518-20 (plurality opinion).

⁵³⁷ *Fay v. Noia*, 372 U.S. 391, 410 (1963).

⁵³⁸ See *Lundy*, 455 U.S. at 510 n.1.

⁵³⁹ *Barefoot*, therefore, may have misjudged the balance of states' rights and individual rights in concluding that courts of appeals could adopt expedited procedures for federal habeas corpus appeals in capital cases.

⁵⁴⁰ *Coleman v. Balkcom*, 451 U.S. 949, 950 (1981) (Stevens, J., concurring in denial of certiorari).

⁵⁴¹ *Barefoot v. Estelle*, 103 S. Ct. 3383, 3391 (1983); see also *Sumner v. Mata*, 449 U.S. 539, 541 (1981) ("limited nature" of federal habeas corpus).

⁵⁴² *Olsen*, *supra* note 472, at 305; see also *Weick*, *supra* note 487, at 747-48.

⁵⁴³ See *supra* note 9 and accompanying text.

The Court in *Barefoot* set forth guidelines⁵⁴⁴ for appellate review of federal habeas corpus petitions in death penalty cases in part to lighten the burden on judicial resources caused by "an increasing number of death-sentenced petitioners . . . entering the appellate stages of the federal habeas process."⁵⁴⁵ The Court's approval of expedited procedures implies a belief that federal habeas corpus petitions in death penalty cases do not fully merit the current level of federal judicial resources devoted to them.

The percentage of condemned persons' federal habeas corpus appeals that are successful suggests that these petitions merit the current level of federal judicial resources devoted to them.⁵⁴⁶ According to statistics compiled by the NAACP, of forty-one decisions by the courts of appeals in capital cases from 1976 through February 1983,⁵⁴⁷ thirty-four involved condemned persons' appeals and seven involved state appeals.⁵⁴⁸ Of these forty-one cases, the condemned person prevailed in thirty, a success rate of 73.2%.⁵⁴⁹ Of the thirty-four cases in which the condemned defendant appealed, the defendant prevailed in twenty-three, a success rate of 67.6%.⁵⁵⁰ This success rate is remarkably high, particularly in comparison with the 6.5% overall rate of success for appeals of federal criminal judgments.⁵⁵¹ This extremely high success rate for condemned persons' federal habeas corpus appeals strongly suggests that the appeals are not frivolous and that the court of appeals' current allocation of judicial resources to these cases is justified.

The Supreme Court in *Furman* and *Gregg* recognized that the eighth amendment requires the minimization of capital sentencing errors.⁵⁵² The frequency with which federal courts of appeals set aside state death sentences indicates that federal appellate review currently plays a vital role in reducing sentencing errors. Because the guidelines in *Barefoot* may lessen the judicial resources federal courts of appeals expend in fulfilling this vital role, those guidelines constitute an unwarranted redistribution of judicial resources at the expense of fairness and consistency in

⁵⁴⁴ See *supra* note 521 (summarizing the guidelines in *Barefoot*).

⁵⁴⁵ *Barefoot*, 103 S. Ct. at 3393.

⁵⁴⁶ See Brief of Amicus Curiae NAACP Legal Defense and Educational Fund, Inc., app. E, at 1e-6e, *Barefoot*, 103 S. Ct. 3383.

⁵⁴⁷ *Id.* at 1e.

⁵⁴⁸ *Id.* at 1e-6e.

⁵⁴⁹ *Id.* at 6e.

⁵⁵⁰ *Id.* The American Bar Association presented different numbers in its amicus brief in *Barefoot*, finding that courts of appeals had set aside death sentences in 22 out of 37 capital cases since 1976, a 59.5% rate. Brief of Amicus Curiae American Bar Association at 7, *Barefoot*, 103 S. Ct. 3383. The ABA's numbers hardly undermine the argument that federal habeas corpus petitions in death penalty cases merit the current level of federal judicial resources devoted to them.

⁵⁵¹ Greenberg, *supra* note 366, at 918 & n.64 (citing ADMIN. OFFICE OF THE U.S. COURTS, 1980 ANNUAL REPORT 97, 2, 51).

⁵⁵² See *supra* notes 80-85, 116-19 and accompanying text (discussing *Furman* and *Gregg*).

capital sentencing. Where an irrevocable punishment is at issue, the judicial system can ill afford this qualitative sacrifice.

c. *The Unique Finality of Capital Punishment*

A third objection to the present scope of federal habeas corpus focuses on the delays caused by habeas corpus proceedings.⁵⁵³ Critics claim that these delays "frustrate society's compelling interest in having its constitutionally valid laws swiftly and surely carried out."⁵⁵⁴ Although society's interest in finality may be compelling in noncapital cases, that interest is outweighed by eighth amendment protections afforded to capital defendants.⁵⁵⁵

The Supreme Court has repeatedly defended the need for finality in criminal proceedings at the expense of the procedural protections afforded by federal habeas corpus.⁵⁵⁶ Ironically, the *Barefoot* decision reveals the Court's particular concern for expediting the adjudication of defendants' federal habeas corpus petitions in death penalty cases. In *Barefoot*, Justice White asserted that such defendants must not use federal habeas corpus "to delay an execution indefinitely."⁵⁵⁷ Instead, the Court urged federal courts to process federal habeas corpus petitions in death penalty cases "as certainly and swiftly as orderly procedures will permit."⁵⁵⁸ Several recent memorandum decisions further demonstrate the Court's impatience with execution delays.⁵⁵⁹ By restricting the role

⁵⁵³ See Olsen, *supra* note 472, at 305; Yackle, *supra* note 471, at 610.

⁵⁵⁴ Jurek v. Estelle, 450 U.S. 1014, 1021 (1981) (Rehnquist, J., dissenting from denial of certiorari).

⁵⁵⁵ See *supra* notes 400-02 and accompanying text.

⁵⁵⁶ See, e.g., Rose v. Lundy, 455 U.S. 509, 528 (1982) (Blackmun, J., concurring in judgment); Sumner v. Mata, 449 U.S. 539, 550 n.3 (1981); Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 490 (1973).

⁵⁵⁷ *Barefoot*, 103 S. Ct. at 3391.

⁵⁵⁸ *Id.*

⁵⁵⁹ Justice Rehnquist has been the Court's most vehement proponent of the need for expeditious appellate procedures in capital cases. In his dissent from the Court's denial of certiorari in *Coleman v. Balkcom*, 451 U.S. 949 (1981), for example, Justice Rehnquist conceded failed to find any meritorious constitutional issue, *id.* at 956 (Rehnquist, J., dissenting from denial of certiorari), but, according to Justice Stevens, Justice Rehnquist wanted to "promptly grant certiorari and decide the merits of every capital case coming from the state courts in order to expedite the administration of the death penalty." *Id.* at 949 (Stevens, J., concurring in denial of certiorari). Justice Rehnquist insisted in *Coleman* that the Court's irresponsible denial of certiorari would "simply further protract the litigation." *Id.* at 963 (Rehnquist, J., dissenting from denial of certiorari). Justice Rehnquist's suggestion is at best impractical, because adding all state capital cases to the Court's already overcrowded docket would undoubtedly increase administrative delays in capital cases. See *id.* at 949-50 (Stevens, J., concurring in denial of certiorari). Nevertheless, Justice Rehnquist's proposal reveals his antipathy toward procedural precautions that delay executions. The "arcane niceties" of capital sentencing review, wrote Justice Rehnquist, amount to a "mockery of our criminal justice system" by providing capital defendants with too many "bites at the apple." *Id.* at 957-58 (Rehnquist, J., dissenting from denial of certiorari).

Chief Justice Burger has also expressed great impatience with execution delays. In *Gray v. Lucas*, 104 S. Ct. 211 (1983) (denial of certiorari and application for stay), Chief Justice

of federal habeas corpus in death penalty cases, the Court has exhibited disdain for the heretofore guiding principle in capital punishment cases—that the imposition of the death penalty requires the fairest and most consistent procedural safeguards reasonably available.⁵⁶⁰

Even more alarming is the Court's view, expressed in *Barefoot*, that delays in administering the death penalty are more deplorable than delays in imposing other forms of punishment because, "unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding."⁵⁶¹ This attitude reveals a shocking disrespect for the procedural guarantees of the eighth amendment as interpreted in the Court's earlier decisions.⁵⁶² Justice Marshall, in his dissent, attacked the *Barefoot* majority's apparent belief "that fewer safeguards are required where life is at stake than where only liberty or property is at stake," calling this belief "truly a perverse suggestion."⁵⁶³ The majority's suggestion in *Barefoot* ignores the different meaning that the need for finality in criminal proceedings has in capital cases. Finality in a death penalty case means not merely the conclusion of legal proceedings and the implementation of a judgment, but the irreversible termination of a life. The constitutional requirement that exhaustive

Burger stated that "[t]his case illustrates a recent pattern of calculated efforts to frustrate valid judgments after painstaking judicial review over a number of years; at some point there must be finality." *Id.* at 213 (Burger, C.J., concurring in denial of certiorari and denial of application for a stay). Gray was executed in Mississippi's gas chamber on September 2, 1983. See NAACP Legal Def. & Educ. Fund, Inc., *Death Row, U.S.A.*, *supra* note 1.

In *Brooks v. Estelle*, 459 U.S. 1061 (1982) (mem.), the Court faced issues similar to those it encountered in *Barefoot v. Estelle*. The Court of Appeals for the Fifth Circuit had rejected Brooks's application for a stay of execution without ruling on the merits of his federal habeas corpus appeal. *Brooks v. Estelle*, 697 F.2d 586, 590 (5th Cir. 1982) (per curiam). The Supreme Court rejected Brooks's contention that the Fifth Circuit had not fully considered the merits of his appeal, agreeing with the court of appeals' refusal to reconsider claims "so often considered and of such little merit." 459 U.S. at 1067 (quoting *Brooks v. Estelle*, 697 F.2d at 590). Brooks was executed on December 7, 1982. See *supra* note 2.

Justice Powell has also expressed misgivings about execution delays caused by the adjudication of federal habeas corpus petitions. In a speech delivered on May 9, 1983, to a conference of Eleventh Circuit judges, Justice Powell asserted that such delays "undermine public confidence in our system of justice." Sherrill, *Death Row on Trial*, N.Y. Times, Nov. 13, 1983, § 6 (Magazine), at 80, 103, and that the criminal justice system "irrationally permits [such] . . . abuse of process." Nat'l L.J., June 6, 1983, at 11, col. 1.

⁵⁶⁰ See *The Supreme Court, 1982 Term*, *supra* note 394, at 122; see also *supra* notes 400-02 and accompanying text.

⁵⁶¹ *Barefoot*, 103 S. Ct. at 3391.

⁵⁶² For a discussion of these earlier decisions, see *supra* notes 70-188 and accompanying text.

⁵⁶³ 103 S. Ct. at 3404 (Marshall, J., dissenting) (emphasis in original). Justice Marshall also attacked "the Court's conclusion that consideration of the merits in ruling on a stay makes an actual decision on the merits of an appeal unnecessary." *Id.* at 3403. Although technically correct, this particular objection was possibly unwarranted: the court of appeals "afforded [*Barefoot*] an unlimited opportunity to make [his] contentions upon the underlying merits by briefs and oral argument," *Barefoot v. Estelle*, 697 F.2d 593, 596 (5th Cir. 1983), and probably fully addressed the merits of his appeal in denying the stay. *Id.* at 596-600. See *supra* notes 516-20 and accompanying text.

procedural safeguards accompany the imposition of the death penalty⁵⁶⁴ surely outweighs the administrative inconvenience caused by the delays unavoidably attending the enforcement of these safeguards.⁵⁶⁵ The Court may choose to tolerate procedural shortcuts in noncapital federal habeas corpus cases,⁵⁶⁶ but should not allow these shortcuts in capital punishment cases.

CONCLUSION

In the 1970s, the Supreme Court held that capital punishment was compatible with the eighth amendment only if imposed through fair and reasonably consistent means.⁵⁶⁷ Although the Court recognized the need for discretion in the sentencing authority's consideration of the individual defendant's character and the nature and circumstances of his crime,⁵⁶⁸ it insisted that statutory capital sentencing schemes must direct and limit such discretion in order to prevent arbitrary, discriminatory, or excessive sentencing decisions.⁵⁶⁹ Most states have sought to achieve fairness and consistency in inflicting the death penalty by promulgating detailed statutory guidelines that limit sentencing discretion, and by providing for direct appellate review of death sentences.⁵⁷⁰ The collateral review of federal habeas corpus provides an additional means of detecting errors⁵⁷¹ that render the capital sentence unconstitutional. In recent cases, however, the Supreme Court has exhibited a willingness to accept capital sentencing statutes and appellate review procedures that compromise both fairness and consistency in imposing the death penalty. These decisions establish a disturbing trend for the future of capital punishment.

The Court has accepted broader sentencing discretion in the sentencing authority's consideration of both mitigating and aggravating circumstances. Allowing the sentencing authority to consider any rele-

⁵⁶⁴ See *supra* notes 400-02 and accompanying text.

⁵⁶⁵ In *Coleman v. Balkcom*, 451 U.S. 949, 950-51 (1981) (Stevens, J., concurring in denial of certiorari), Justice Stevens indicated that these delays may be only temporary. He ascribed part of the delays in the administration of the death penalty to "the enactment of [post-*Furman*] state legislation [which] generated a number of novel constitutional questions," concluding that present delays are likely to become shorter as the constitutional requirements grow clearer. *Id.*

⁵⁶⁶ See, e.g., *Garrison v. Patterson*, 391 U.S. 464, 466 (1968) (per curiam) (courts of appeals may concurrently consider questions of probable cause and the merits of a habeas corpus appeal).

⁵⁶⁷ See *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982).

⁵⁶⁸ See *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (plurality opinion) (upholding a Georgia death penalty statute permitting sentencing authority to take into account aggravating and mitigating factors).

⁵⁶⁹ See *id.* at 206-07.

⁵⁷⁰ See *infra* notes 609-12, 743-52 and accompanying text.

⁵⁷¹ For a definition of capital sentencing "errors," see *supra* note 364.

vant mitigating circumstance raised by the defendant⁵⁷² does not directly disadvantage that defendant. Nevertheless, this practice reduces statutory supervision of the sentencing process, contrary to the Court's prior insistence that the sentencer's discretion must be "suitably directed and limited."⁵⁷³ The Court's acceptance of increased sentencing discretion in considering aggravating circumstances gives rise to a more serious concern. The Court has recently upheld death sentences where the sentencing authority may have based its decision partly on an invalid aggravating circumstance (or on a potentially aggravating factor unrelated to the defendant's character or the nature of his crime), because the sentencer also found a valid aggravating circumstance.⁵⁷⁴ These decisions increase the likelihood of capital sentencing errors that result in unconstitutional executions. Although a sentencing authority may properly impose a death sentence where it finds only one valid aggravating circumstance, it may also choose in its discretion not to impose that penalty. The added presence of an invalid aggravating circumstance may tip the sentencing authority's decision toward imposing a death sentence.

Similarly, statutory capital sentencing schemes that provide only "threshold" guidance of sentencing discretion, by permitting untrammelled discretion once the prosecutor has established a statutory aggravating circumstance,⁵⁷⁵ increase the likelihood of unfair or inconsistent sentencing decisions. Aside from requiring one aggravating circumstance, these "threshold" statutes provide no more guidance than the death penalty statutes struck down in *Furman*. The Court's approval of these statutes is therefore inconsistent with the Court's capital punishment decisions of the 1970s.

Recent developments in the areas of state appellate review and federal habeas corpus review of death sentences also increase the potential for unfairness and inconsistency in capital punishment. State appellate review, including comparative proportionality review and procedural compliance review, provides a valuable post-sentencing check against capital sentencing errors that statutory guidelines cannot supply. States that now require comparative proportionality review of death sentences, however, may restrict or eliminate that review in light of the Court's

⁵⁷² See *Eddings*, 455 U.S. at 110 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion)).

⁵⁷³ *Gregg*, 428 U.S. at 189 (plurality opinion).

⁵⁷⁴ *Zant v. Stephens*, 103 S. Ct. 2733, 2748-50 (1983); *Barclay v. Florida*, 103 S. Ct. 3418, 3427-28 (1983).

⁵⁷⁵ Georgia's death penalty statute, upheld in *Zant v. Stephens*, 103 S. Ct. 2733 (1983), provides such "threshold" guidance. As the *Zant* Court noted, "in Georgia the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion." *Id.* at 2741.

decision in *Pulley v. Harris*.⁵⁷⁶ Equally troubling is the prospect of the adoption of summary procedures to expedite a condemned person's appeal from a denial of federal habeas corpus.⁵⁷⁷ In the past, the Court has repeatedly recognized that the death penalty's unique severity and irrevocability demand greater procedural precautions in administering that penalty than in administering punishment in noncapital cases.⁵⁷⁸ Yet the Court's new procedural guidelines, which tolerate shortcuts in federal habeas corpus appeals in order to minimize execution delays, reduce the role of federal habeas corpus in death penalty cases and turn this uniqueness principle on its head.

Thus, the Supreme Court's recent death penalty decisions mark an abandonment of its pursuit of fairness and consistency in capital sentencing. By accepting capital sentencing schemes that provide the sentencing authority with greater discretion, the Court has increased the likelihood that sentencing authorities will abuse this discretion by permitting factors wholly unrelated to the defendant's character or the nature of his crime to influence their decisions. By allowing greater restrictions on the condemned person's opportunities for meaningful review of his sentence in state and federal courts, the Court has decreased the likelihood that courts engaging in death sentence review will detect instances of these abuses of discretion. By simultaneously enhancing the possibility of capital sentencing errors and reducing the possibility of detecting these errors, the Court has greatly increased the likelihood of state executions that violate the eighth amendment.

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⁵⁷⁶ 104 S. Ct. 871 (1984).

⁵⁷⁷ See *Barefoot v. Estelle*, 103 S. Ct. 3383, 3394-95 (1983).

⁵⁷⁸ See *supra* notes 400-02 and accompanying text.

APPENDIX
DISCUSSION OF STATE CAPITAL PUNISHMENT STATUTES
CURRENTLY IN FORCE

This Appendix describes and analyzes the various capital punishment statutes in the United States. Thirty-six states plus Vermont—which retains an unused capital punishment statute of dubious constitutionality⁵⁷⁹—have death penalty laws. The thirty-six states are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.⁵⁸⁰

PRE-FURMAN STATUTES

Prior to *Furman v. Georgia*,⁵⁸¹ state legislatures generally accorded the sentencing authority absolute discretion in determining whether persons convicted of a capital offense should be executed.⁵⁸² One of the Georgia statutes challenged in *Furman*, for example, provided in part: "The crime of rape shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment for life" ⁵⁸³ This provision failed to help the jury decide whether a capital defendant should be put to death or given mercy. Justice Stewart therefore concluded in *Furman* that

the death sentences now before us are the product of a legal system that brings them . . . within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments. . . .

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.⁵⁸⁴

Furman thus reversed three death sentences imposed by juries acting

⁵⁷⁹ See *infra* notes 590-91 and accompanying text (discussing the Vermont statute).

⁵⁸⁰ Eleven states have carried out at least one execution since 1977: Alabama, Florida (seven persons executed), Georgia (two), Indiana, Louisiana (three), Mississippi, Nevada, North Carolina, Texas (three), Utah, and Virginia. See *supra* notes 1 & 2.

⁵⁸¹ 408 U.S. 238 (1972).

⁵⁸² See *supra* note 15 and accompanying text.

⁵⁸³ GA. CODE ANN. § 26-1302 (Supp. 1971) (repealed 1968). The other statutory provisions that the *Furman* Court struck down were § 26-1005 of the Georgia Code, GA. CODE ANN. § 26-1005 (Supp. 1971) (repealed 1968), providing that the jury may recommend life imprisonment instead of death for a defendant convicted of murder, and article 1189 of the former Texas Penal Code, TEX. PENAL CODE ANN. app. tit. 15 ch. 8, art. 1189 (Vernon 1974) (repealed 1973) providing that "[a] person guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five." 408 U.S. at 239-40.

⁵⁸⁴ 408 U.S. at 309 (Stewart, J., concurring); see *supra* notes 82-83 and accompanying text.

without statutory guidelines,⁵⁸⁵ effectively invalidating the capital punishment laws in thirty-nine out of forty states with death penalties.⁵⁸⁶

Most state legislatures responded to *Furman* by passing new death penalty statutes.⁵⁸⁷ At present, thirty-seven states include executions as part of their criminal justice system.⁵⁸⁸ Vermont is the only state with a pre-*Furman* statute still in force. Originally enacted in 1957,⁵⁸⁹ the Vermont law simply provides that "[t]he punishment for murder in the first degree of [any corrections employee or law enforcement officer] shall be death or imprisonment for life as the jury shall determine."⁵⁹⁰ This statute, which gives the capital sentencing jury absolute discretion in fixing a penalty, remains in force only because Vermont has never used it.⁵⁹¹

MANDATORY DEATH SENTENCE STATUTES

Ten states responded to *Furman's* invalidation of discretionary capital sentencing schemes by prescribing mandatory imposition of the death penalty for certain violent crimes.⁵⁹² This approach was "designed to eliminate sentencing discretion altogether" in an effort to avoid a *Furman*-type challenge.⁵⁹³ In *Woodson v. North Carolina*,⁵⁹⁴ however, the Supreme Court found that North Carolina's mandatory capital punishment statute "fail[ed] to provide a constitutionally tolerable response to *Furman's* rejection of unbridled jury discretion in the imposition of capital sentences."⁵⁹⁵ Similarly, in *Roberts v. Louisiana (H. Roberts)*,⁵⁹⁶ the Court struck down Louisiana's statute mandating the death penalty for the murder of a police officer⁵⁹⁷ because it did not "allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense."⁵⁹⁸

⁵⁸⁵ For a discussion of *Furman*, see *supra* notes 70-91 and accompanying text.

⁵⁸⁶ See *supra* note 91 and accompanying text.

⁵⁸⁷ See *Gregg v. Georgia*, 428 U.S. 153, 179 & n.23 (1976) (plurality opinion) (noting that at least 35 states enacted capital punishment statutes after *Furman*).

⁵⁸⁸ For a listing of the 37 states with a death penalty, see *supra* text accompanying notes 579-80. Massachusetts is the most recent state to have enacted a death penalty statute. See MASS. ANN. LAWS ch. 279, § 70 (Michie/Law. Co-op. Supp. 1983) (approved Dec. 22, 1982; effective Jan. 1, 1983).

⁵⁸⁹ VT. STAT. ANN. tit. 13, § 2303 (Supp. 1983).

⁵⁹⁰ VT. STAT. ANN. tit. 13, § 2303(c) (Supp. 1983).

⁵⁹¹ Gillers, *supra* note 5, at 13 n.48.

⁵⁹² See *Woodson v. North Carolina*, 428 U.S. 280, 313 (1976) (Rehnquist, J., dissenting) (citation omitted).

⁵⁹³ Bowers & Pierce, *Arbitrariness & Discrimination under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 565 (1980).

⁵⁹⁴ 428 U.S. 280 (1976).

⁵⁹⁵ *Id.* at 302 (plurality opinion); see *supra* text accompanying notes 133-34.

⁵⁹⁶ 431 U.S. 633 (1977) (per curiam).

⁵⁹⁷ The Court had previously held that Louisiana's statute imposing a mandatory death penalty for any first degree murder violated the eighth and fourteenth amendments in *Roberts v. Louisiana (S. Roberts)*, 428 U.S. 325, 336 (1976).

⁵⁹⁸ *H. Roberts*, 431 U.S. at 637 (per curiam); see *supra* text accompanying notes 141.

Most state legislatures responded to the Supreme Court's decisions by repealing their mandatory death penalty laws.⁵⁹⁹ Until recently, New York was the only state that retained a mandatory death sentence statute.⁶⁰⁰ Although the New York Court of Appeals declared this statute unconstitutional in 1977,⁶⁰¹ one section of the statute not challenged in that case⁶⁰² remained in force until the state's highest court struck it down in a 1984 decision.⁶⁰³ The last section of the New York statute to be invalidated mandated capital punishment for murder committed by a prisoner serving a life sentence or an escapee from a life sentence.⁶⁰⁴ This section of the statute remained in force as long as it did only because New York has not executed anyone since 1964.⁶⁰⁵

GUIDED DISCRETION IN CAPITAL SENTENCING

In the four years following the Court's decision in *Furman*, twenty-five states⁶⁰⁶ adopted modified versions of the Model Penal Code capital sentencing scheme,⁶⁰⁷ by providing for detailed statutory sentencing guidelines to control the sentencing authority's discretion in deciding whether to impose the death penalty. This system of "guided discretion" strikes a "balance between the wide discretion allowed before *Furman* and the rigidity of mandatory death penalty laws passed in response to *Furman* but found unconstitutional in several rulings during

⁵⁹⁹ See LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUST., CAPITAL PUNISHMENT 1977, at 1 (Nov. 1978).

⁶⁰⁰ The New York law imposing a mandatory death sentence for persons convicted of murder while serving a prison sentence of 15 years or more was held unconstitutional in *People v. Smith*, No. 235 (N.Y. July 2, 1984) (available on LEXIS, N.Y. Library, cases file).

⁶⁰¹ *People v. Davis*, 43 N.Y.2d 17, 37, 371 N.E.2d 456, 466, 400 N.Y.S.2d 735, 746, *cert. denied*, 435 U.S. 998 (1977).

⁶⁰² *Id.* at 34 n.3, 371 N.E.2d at 465 n.3, 400 N.Y.S.2d at 745 n.3.

⁶⁰³ See *People v. Smith*, No. 235 (N.Y. July 2, 1984) (available on LEXIS, N.Y. library, cases file) (holding that "a mandatory death statute simply cannot be reconciled with the scrupulous care the legal system demands to insure that the death penalty fits the individual and the crime.").

⁶⁰⁴ N.Y. PENAL LAW § 125.27(1)(a)(iii) (McKinney 1975) (defining first degree murder). This section is then read concurrently with § 60.06, the mandatory death sentence statute. See *supra* note 600.

⁶⁰⁵ CAPITAL PUNISHMENT 1981, *supra* note 3, at 15 (New York entry in table 2) (1930-81). In *People v. Smith*, No. 235 (N.Y. July 2, 1984) (available on LEXIS, N.Y. library, cases file), the New York Court of Appeals vacated the sentence of the lone resident of New York's death row. See *supra* note 603.

⁶⁰⁶ After *Furman*, 35 states enacted new death penalty statutes. See *supra* note 587 and accompanying text. Of these states, only 10 enacted mandatory death penalty statutes. See *Woodson v. North Carolina*, 428 U.S. 280, 313 (Rehnquist, J., dissenting) (noting that "following *Furman* 10 States enacted laws providing for mandatory capital punishment"). The remaining 25 states passed statutes providing for detailed statutory guidelines to control the sentencing authority's discretion in deciding whether to impose the death penalty. See *supra* note 101 and accompanying text.

⁶⁰⁷ For a description of the Model Penal Code approach, see *supra* note 14.

1976."⁶⁰⁸

All thirty-six of the post-*Furman* state death penalty laws⁶⁰⁹ currently in effect are modeled after one of the three statutory schemes upheld by the Supreme Court in *Gregg v. Georgia*,⁶¹⁰ *Proffitt v. Florida*,⁶¹¹ and *Jurek v. Texas*.⁶¹² The large majority of these statutes are modeled after the Florida law upheld in *Proffitt*.⁶¹³ The statute challenged in *Proffitt* required the trier of fact to weigh eight aggravating circumstances against seven mitigating circumstances to determine whether to impose the death penalty.⁶¹⁴ These enumerated statutory circumstances relate to the manner in which the capital offense was committed and the character of the defendant. Twenty-nine states have followed this framework and now provide statutory lists of aggravating and mitigating factors relevant to sentencing.⁶¹⁵

⁶⁰⁸ CAPITAL PUNISHMENT 1982, *supra* note 3, at 3.

⁶⁰⁹ Only Vermont has a death penalty statute that is not modeled after the statutes upheld in *Gregg*, *Proffitt*, and *Jurek*. The Vermont statute fails to provide for guided discretion in capital sentencing. See *supra* notes 589-91 and accompanying text.

⁶¹⁰ 428 U.S. 153 (1976).

⁶¹¹ 428 U.S. 242 (1976).

⁶¹² 428 U.S. 262 (1976). See ALA. CODE §§ 13A-5-45 to -55 (1982); ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1983); ARK. STAT. ANN. §§ 41-1301 to -1305 (1977); CAL. PENAL CODE §§ 190.2-.5 (West Supp. 1984); COLO. REV. STAT. § 16-11-103(6) (Supp. 1983); CONN. GEN. STAT. § 53a-46a (1983); DEL. CODE ANN. tit. 11, § 4209 (Supp. 1982); FLA. STAT. ANN. § 921.141 (West Supp. 1983); GA. CODE §§ 17-10-30 to -44 (1982); IDAHO CODE § 19-2515 (1979); ILL. ANN. STAT. ch. 38, ¶ 9-1 (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9 (Burns Supp. 1983); KY. REV. STAT. ANN. §§ 532.025(2)-.035 (Baldwin 1983); LA. CODE CRIM. PROC. ANN. arts. 905.3-9 (West Supp. 1984); MD. ANN. CODE art. 27, §§ 412-414 (Supp. 1983); MASS. ANN. LAWS ch. 279, §§ 68-71 (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. §§ 99-19-101 to -107 (Supp. 1983); MO. ANN. STAT. § 565.030-.035 (Vernon Supp. 1984); MONT. CODE ANN. §§ 46-18-301 to -310 (1983); NEB. REV. STAT. §§ 29-2522 to -2523 (1979); NEV. REV. STAT. §§ 175.552, 200.030-.035 (1983); N.H. REV. STAT. ANN. § 630:5 (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c) (West 1982); N.M. STAT. ANN. §§ 31-20A-3 to -6 (1981); N.C. GEN. STAT. §§ 15A-2000 to -2202 (1983); OHIO REV. CODE ANN. §§ 2929.02-.06 (Page 1982); OKLA. STAT. ANN. tit. 21, §§ 701.9-.13 (West 1983); 42 PA. CONS. STAT. ANN. § 9711 (Purdon 1982); S.C. CODE ANN. §§ 16-3-20 to -28 (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. §§ 23A-27A-1 to -41 (1979 & Supp. 1983); TENN. CODE ANN. §§ 39-2-203 to -205 (1982); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981 & Supp. 1984); UTAH CODE ANN. §§ 76-3-206 to -207 (1978 & Supp. 1983); VA. CODE § 19.2-264.2 to -264.5 (1983); WASH. REV. CODE ANN. § 10.95.020-.150 (Supp. 1984); WYO. STAT. §§ 6-2-102 to -103 (1983).

⁶¹³ See *infra* note 615 and accompanying text.

⁶¹⁴ See 428 U.S. at 248-49 (plurality opinion). The Florida statute challenged and upheld in *Proffitt* was FLA. STAT. ANN. § 921.141 (West Supp. 1976-1977) (current version at FLA. STAT. ANN. § 921.141 (West Supp. 1984)). Florida's capital sentencing procedure was essentially patterned after the Model Penal Code. See *Proffitt*, 428 U.S. at 248. For discussion of the Model Penal Code approach and the states that have followed it, see *supra* note 14; *supra* notes 606-07 and accompanying text.

⁶¹⁵ ALA. CODE §§ 13A-5-49 to -51 (1982 & Supp. 1983); ARIZ. REV. STAT. ANN. § 13-703(F)-(G) (Supp. 1983); ARK. STAT. ANN. §§ 14-1303 to -1304 (1977); CAL. PENAL CODE §§ 190.2(a), 190.3 (West Supp. 1984); COLO. REV. STAT. § 16-11-103(5)-(6), (5.1)-(6) (1978 & Supp. 1983); CONN. GEN. STAT. § 53a-46a(f)-(g) (1983); FLA. STAT. ANN. §§ 921.141(5)-(6) (West Supp. 1983); ILL. ANN. STAT. ch. 38, ¶ 9-1(b)-(c) (Smith-Hurd Supp. 1983); IND. CODE

The second group of states follow the Georgia scheme upheld in *Gregg*.⁶¹⁶ These five states⁶¹⁷ provide a list of statutory aggravating circumstances,⁶¹⁸ but give no guidance as to the mitigating circumstances the sentencer should consider. The Oklahoma statute, for example, provides that "[i]n the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act."⁶¹⁹

The third type of death penalty statute, upheld in *Jurek*⁶²⁰ and followed in Texas and Virginia, does not specify aggravating circumstances. The Texas statute designates five specific forms of murder as capital offenses: murder of a peace officer or fireman, murder committed in the course of certain felonies, murder for hire, murder committed by a prison inmate, and murder committed while escaping from prison.⁶²¹ After the jury has determined guilt, the court submits three questions to the same jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.⁶²²

If the jury returns affirmative findings on all three questions, the court

ANN. § 35-50-2-9(b)-(c) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. arts. 905.4, 905.5 (West Supp. 1984); MD. ANN. CODE art. 27, § 413(d), (g) (1982 & Supp. 1983); MASS. ANN. LAWS ch. 279, § 69 (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101 (Supp. 1983); MO. ANN. STAT. §§ 565.012.2, 565.012.3 (Vernon Supp. 1984); MONT. CODE ANN. §§ 46-18-303 to -304 (1983); NEB. REV. STAT. § 29-2523 (1979); NEV. REV. STAT. §§ 200.033, 200.035 (1983); N.H. REV. STAT. ANN. § 630:5(II) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(4)-(5) (West 1982); N.M. STAT. ANN. §§ 31-20A-5, 31-20A-6 (1981); N.C. GEN. STAT. § 15A-2000(e), (f) (1983); OHIO REV. CODE ANN. § 2929.04 (Page 1982); 42 PA. CONS. STAT. ANN. § 9711(d), (e) (Purdon 1982); S.C. CODE ANN. 16-3-20(C) (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-203(i), (j) (1982); UTAH CODE ANN. §§ 76-5-202, 76-3-207 (Supp. 1983); WASH. REV. CODE ANN. §§ 10.95.020-.070 (Supp. 1984); WYO. STAT. § 6-2-102(h), (j) (1983).

⁶¹⁶ 428 U.S. 153 (1976). For a description of this Georgia statute, see *supra* note 109.

⁶¹⁷ See DEL. CODE ANN. tit. 11, § 4209(e) (Supp. 1982); GA. CODE § 17-10-30(b)(1) (1982); IDAHO CODE § 19-2515(f) (1979); OKLA. STAT. ANN. tit. 21, § 701.10 (West 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (Supp. 1983).

⁶¹⁸ The first group of states also provide lists of statutory aggravating circumstances. See *supra* note 615 and accompanying text.

⁶¹⁹ OKLA. STAT. ANN. tit. 21, § 701.10 (West 1983).

⁶²⁰ 428 U.S. 262 (1976).

⁶²¹ See *supra* notes 126-27 and accompanying text.

⁶²² TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981); see *supra* note 128.

must impose the death penalty.⁶²³ Although the Texas law is a mandatory death sentence statute on its face,⁶²⁴ Texas courts have interpreted the future dangerousness question (question (2)) as allowing the defendant to offer any mitigating evidence.⁶²⁵

In Virginia, the seven forms of capital murder are: murder in the commission of abduction, murder for hire, murder by a prisoner, murder in the commission of armed robbery, murder during or after the commission of rape, murder of a law-enforcement officer, and murder of more than one person as part of the same act or transaction.⁶²⁶ Under Virginia's death penalty statute, the sentencing authority cannot impose the death penalty unless

(1) after consideration of the past criminal record of convictions of the defendant, [it] find[s] that there is probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend[s] that the penalty of death be imposed.⁶²⁷

Unlike Texas, Virginia provides statutory guidance concerning mitigating factors.⁶²⁸

CAPITAL OFFENSES

In *Coker v. Georgia*,⁶²⁹ the Supreme Court held that the penalty of death for the rape of an adult woman was disproportionate and excessive to the crime and therefore violated the eighth amendment.⁶³⁰ In response, the majority of states have restricted capital offenses to some form of murder or felonies resulting in death.⁶³¹ Some states, however, continue to designate crimes not resulting in death as capital offenses. Four states make some form of aggravated kidnapping a capital of-

623 TEX. CODE CRIM. PROC. ANN. art. 37.071(e) (Vernon Supp. 1984).

624 See *supra* note 129.

625 See *Jurek*, 428 U.S. at 272-73.

626 VA. CODE § 18.2-31 (Supp. 1983).

627 VA. CODE § 19.2-264.2 (1983); see also VA. CODE § 19.2-264.4(C) (1983) (state must prove beyond a reasonable doubt probability of future dangerousness or that conduct was "outrageously or wantonly vile, horrible or inhuman" before death penalty can be imposed).

628 VA. CODE § 19.2-264.4(B) (1983).

629 433 U.S. 584 (1977).

630 *Id.* at 592 (plurality opinion). For a further discussion of *Coker*, see *infra* note 638.

631 See CAPITAL PUNISHMENT 1981, *supra* note 3, at 10-11 ("status of death penalty statutes by jurisdiction"). The following felonies resulting in death are capital offenses in California: "Assault by life prisoner resulting in death"; "Hindering preparing for war causing death"; "Omitting to note defects in articles of war resulting in death"; "Perjury resulting in the death penalty"; and "Train wrecking resulting in death." *Id.* at 10. In Georgia, rape or armed robbery resulting in the victim's death is a capital offense. *Id.* Kidnapping resulting in death to the victim is a capital offense in both Kentucky and Montana. *Id.* at 11.

fense.⁶³² Three states make some form of aggravated rape a capital offense.⁶³³ A person convicted of treason may be sentenced to death in three states.⁶³⁴ Two states include skyjacking as a capital offense.⁶³⁵ Finally, Colorado provides that certain drug offenses may warrant the death sentence.⁶³⁶ The Supreme Court, however, has not decided whether most crimes other than murder may be constitutionally designated as capital offenses.⁶³⁷ In light of the Court's decision in *Coker*,⁶³⁸

632 *Id.* at 10-11 (Georgia—"kidnapping with bodily injury"; Idaho—first degree kidnapping, unless kidnapper released victim unharmed; South Dakota—kidnapping when the kidnapper inflicted gross permanent physical injury on victim; Wyoming—kidnapping, unless kidnapper released victim unharmed).

633 *Id.* (Florida—"The sexual battery of a female child age 11 or under by a male age 18 or older"; Mississippi—"The rape of a female child under age 12 by a person age 18 or older"; Oklahoma—"The rape of a female under age 14 by a male over age 17 or the rape of a person mentally incompetent").

634 *Id.* (California, Georgia, and Mississippi).

635 *Id.* (Georgia—"Aircraft hijacking"; Mississippi—"Aircraft piracy").

636 *Id.* at 10 ("inducing a person age 25 or under to use or administer narcotic drugs unlawfully; unlawfully administering or dispensing a narcotic drug to a person age 25 or under; using a person age 25 or under for the unlawful transportation or production of narcotic drugs").

637 CAPITAL PUNISHMENT 1982, *supra* note 3, at 2-3 n.5.

638 In *Coker*, four members of the Court concluded that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." 433 U.S. at 592 (plurality opinion) (footnote omitted). The plurality "observe[d] that in the light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system." *Id.* at 593 n.4. The plurality further noted that of the 16 states which declared rape a capital offense prior to *Furman*, only three states—Georgia, Louisiana, and North Carolina—retained that classification when they revised their death penalty statutes in light of *Furman*. *Id.* at 594. In dissent, Chief Justice Burger criticized the plurality, arguing that "it is myopic to base sweeping constitutional principles upon the narrow experience of the past five years [given that] [c]onsiderable uncertainty was introduced into this area of the law by this Court's *Furman* decision." *Id.* at 614 (Burger, C.J., dissenting).

According to Chief Justice Burger, a second reason underlying the holding in *Coker* was "a subjective judgment that death is an excessive punishment for rape because the crime does not, in and of itself, cause the death of the victim." *Id.* at 613. Justice White, writing for the plurality, noted that rape is a serious and reprehensible crime deserving of severe punishment, but nevertheless concluded that "in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which . . . involve[s] the unjustified taking of human life." *Id.* at 598 (plurality opinion).

The *Coker* plurality thus based its holding on two grounds: first, "the legislative rejection of capital punishment for rape," *id.* at 597; and second, "[t]he murderer kills [while] the rapist . . . does not." *Id.* at 598. See also *id.* at 613 (Burger, C.J., dissenting) (dividing the analysis of the plurality opinion into two parts). Of the five crimes that certain states currently designate as capital offenses but which do not cause death to the victim, no more than four states agree that any one of those crimes deserves the death penalty. See *supra* notes 632-36 and accompanying text.

Coker could be interpreted as establishing a two-part constitutional test for valid capital offenses: first, legislatures must not have widely rejected capital punishment for the crimes in question; and second, the crime must involve the taking of life. Because most states have rejected capital punishment for crimes that do not cause death to the victim, and because

capital punishment for these crimes would probably be struck down as disproportionate and excessive.

BIFURCATED PROCEEDINGS

The Supreme Court held in *McGautha v. California*⁶³⁹ that separate guilt determination and sentencing trials are not constitutionally required in capital cases.⁶⁴⁰ Although the Court noted that "the Federal Constitution . . . does not guarantee trial procedures that are the best of all worlds,"⁶⁴¹ it conceded that "bifurcated trials . . . are [a] superior means of dealing with capital cases."⁶⁴² All thirty-six states with valid capital punishment statutes provide for bifurcated proceedings.⁶⁴³ The Florida statute, for example, provides that "[u]pon conviction of adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment."⁶⁴⁴

At the separate sentencing proceeding the prosecution may present evidence of aggravating circumstances, while the defense may present

these offenses do not involve the taking of life, the imposition of the death penalty on an offender who has not himself caused death might be unconstitutional.

639 402 U.S. 183 (1971).

640 *Id.* at 220; *see supra* notes 64-69 and accompanying text.

641 402 U.S. at 221.

642 *Id.*; *see supra* note 64.

643 ALA. CODE § 13A-5-45(a) (1982); ARIZ. REV. STAT. ANN. § 13-703(B) (Supp. 1983); ARK. STAT. ANN. § 41-1301(3) (1977); CAL. PENAL CODE § 190.1 (West Supp. 1984); COLO. REV. STAT. § 16-11-103 (1978); CONN. GEN. STAT. § 53a-46a(b) (1983); DEL. CODE ANN. tit. 11, § 4209(b) (1979); FLA. STAT. ANN. § 921.141(1) (West Supp. 1983); IDAHO CODE § 19-2515(c) (1979); ILL. ANN. STAT. ch. 38, § 9-1(d) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9(a) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(1) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905 (West Supp. 1984); MD. ANN. CODE art. 27, § 413(a) (Supp. 1983); MASS. ANN. LAWS ch. 279, § 68 (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(1) (Supp. 1983); MO. ANN. STAT. § 565.030.2 (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-301 (1983); NEB. REV. STAT. § 29-2522 (1979); NEV. REV. STAT. § 175.552 (1983); N.H. REV. STAT. ANN. § 630:5(II) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(1) (West 1982); N.M. STAT. ANN. § 31-20A-1(B) (1981); N.C. GEN. STAT. § 15A-2000(a)(1) (1983); OHIO REV. CODE ANN. § 2929.03(C) (2) (Page 1982); OKLA. STAT. ANN. tit. 21, § 701.10 (West 1983); 42 PA. CONS. STAT. ANN. § 9711(a)(1) (Purdon 1982); S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-2 (1979); TENN. CODE ANN. § 39-2-203(a) (1982); TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon 1981); UTAH CODE ANN. § 76-3-207(1) (Supp. 1983); VA. CODE § 19-2-264.3(C) (1983); WASH. REV. CODE ANN. § 10.95.050(1) (Supp. 1984); WYO. STAT. § 6-2-102(a) (1983).

The Georgia statute did not specifically require bifurcated proceedings in capital cases: "In all cases tried by a jury in which the death penalty may be imposed, upon a return of a verdict of 'guilty' by the jury, the court shall *resume* the trial and conduct a presentence hearing before the jury." GA. CODE § 17-10-2(c) (1982) (enacted 1974) (emphasis added). The Georgia Supreme Court, however, resolved this ambiguity in the language by interpreting Georgia's capital punishment statute as requiring a separate sentencing proceeding. *See Miller v. State*, 237 Ga. 557, 559, 229 S.E.2d 376, 377 (1976).

644 FLA. STAT. ANN. § 921.141(1) (West Supp. 1983).

evidence of mitigating circumstances.⁶⁴⁵ The purpose of bifurcated proceedings in capital cases is to focus additional evidence and argument solely on the choice of whether to impose the death penalty. Bifurcation thus allows a capital defendant to exercise his fifth amendment right against self-incrimination by not testifying at the guilt-determination stage without forfeiting any opportunity to speak on his own behalf regarding the sentencing decision.⁶⁴⁶ Bifurcation also prevents the prosecution from offering, at the guilt determination stage, prejudicial evidence that should be considered only for sentencing purposes.⁶⁴⁷

EVIDENCE AT THE SENTENCING TRIAL

Depending on the jurisdiction, the ordinary rules of evidence for criminal trials may or may not apply in the penalty hearing in capital cases. Seven states expressly provide that counsel may present any relevant evidence regardless of its admissibility under the exclusionary rules of evidence.⁶⁴⁸ The Alabama capital punishment statute, for example, provides: "Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements."⁶⁴⁹ At least fifteen other states' capital punishment statutes seem to allow the sentencing authority to hear any evidence, although the statutes do not expressly indicate that the ordinary rules of evidence shall not apply.⁶⁵⁰ In Idaho, for example, "[e]vidence offered at [the guilt determination] trial but not admitted may be repeated or amplified if necessary to complete the record."⁶⁵¹ In Mississippi, "evidence may be presented as to any matter that the court deems relevant to sentence," but this language "shall not be construed to authorize the introduction of any evidence secured in violation of the [Federal or

⁶⁴⁵ See, e.g., FLA. STAT. ANN. § 921.141(1) (West Supp. 1983).

⁶⁴⁶ See *supra* note 64.

⁶⁴⁷ See *id.*

⁶⁴⁸ ALA. CODE § 13A-5-45(d) (1982); FLA. STAT. ANN. § 921.141(1) (West Supp. 1983); MONT. CODE ANN. § 16-18-302 (1983); TENN. CODE ANN. § 39-2-203(C) (1982); UTAH CODE ANN. § 76-3-207(2) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.060(3) (Supp. 1984); WYO. STAT. § 6-2-102(c) (1983).

⁶⁴⁹ ALA. CODE § 13A-5-45(d) (1982).

⁶⁵⁰ DEL. CODE ANN. tit. 11, § 4209(c)(1) (1979); GA. CODE § 17-10-2(a)-(b) (1982); IDAHO CODE § 19-2515(c) (1979); IND. CODE ANN. § 35-50-2-9(d) (Burns. Supp. 1983); KY. REV. STAT. ANN. § 532.025 (Baldwin 1983); MD. ANN. CODE art. 27, § 413(c) (Supp. 1983); MISS. CODE ANN. § 99-19-101(1) (Supp. 1983); NEB. REV. STAT. § 29-2521 (1979); NEV. REV. STAT. § 175.552 (1983); N.H. REV. STAT. ANN. § 630:5(II) (Supp. 1983); N.M. STAT. ANN. § 31-20A-1(C) (1981); N.C. GEN. STAT. § 15A-2000(a)(3) (Supp. 1983); OKLA. STAT. ANN. tit. 21, § 701.10 (West 1983); S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. Supp. 1983); TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon 1981).

⁶⁵¹ IDAHO CODE § 19-2515(c) (1979).

State] Constitutions"⁶⁵² The Oklahoma, South Carolina, and Texas statutes have similar provisions.⁶⁵³ California's capital punishment statute provides generally that the court may admit any evidence at the sentencing hearing, but there are two statutory exceptions: evidence regarding the defendant's prior nonviolent criminal activity and evidence regarding any prior criminal prosecution in which the defendant was acquitted.⁶⁵⁴

Only three states—Louisiana, Missouri, and Virginia—unambiguously subject evidence offered at the sentencing stage of capital cases to the same rules of evidence that govern at trial.⁶⁵⁵ The Pennsylvania capital punishment statute implies that the ordinary rules of evidence shall govern, but does not expressly mention those rules: "evidence may be presented as to any matter that the court deems relevant *and admissible* on the question of the sentence to be imposed"⁶⁵⁶

Five states provide that evidence of any mitigating circumstances may be presented regardless of its admissibility under the rules of evidence; but the rules do apply with respect to aggravating circumstances.⁶⁵⁷ The Ohio capital punishment statute affords the defendant "great latitude" in presenting evidence in mitigation of the sentence.⁶⁵⁸ In Illinois, evidence of statutory aggravating circumstances (including the defendant's rebuttal evidence) is subject to the ordinary rules of evidence, but the court may admit evidence relating to the statutory mitigating circumstances and to any additional (nonstatutory) aggravating factors without regard to those rules.⁶⁵⁹

The New Jersey and South Dakota death penalty laws do not indicate whether the ordinary rules of evidence for a criminal trial apply to evidence introduced at the sentencing hearing in capital cases. The New Jersey statute provides that "[t]he State and the defendant [may]

⁶⁵² MISS. CODE ANN. § 99-19-101(1).

⁶⁵³ See OKLA. STAT. ANN. tit. 21, § 701.10 (West 1983); S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. Supp. 1983); TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon 1981).

⁶⁵⁴ CAL. PENAL CODE § 190.3 (West Supp. 1984).

⁶⁵⁵ LA. CODE CRIM. PROC. ANN. art. 905.2 (West Supp. 1984); MO. ANN. STAT. § 565.030.4 (Vernon Supp. 1984); VA. CODE § 19.2-264.4(B) (1983).

⁶⁵⁶ 42 PA. CONS. STAT. ANN. § 9711(a)(2) (Purdon 1982) (emphasis added).

⁶⁵⁷ ARIZ. REV. STAT. ANN. § 13-703(C) (Supp. 1983); ARK. STAT. ANN. § 41-1301(4) (1977); COLO. REV. STAT. § 16-11-103(2) (Supp. 1983); CONN. GEN. STAT. § 53a-46a(c) (1983); MASS. ANN. LAWS ch. 279, § 68 (Michie/Law. Co-op. Supp. 1984).

⁶⁵⁸ OHIO REV. CODE ANN. § 2929.03(D)(1) (Page 1982).

⁶⁵⁹ ILL. ANN. STAT. ch. 38, § 9-1(e) (Smith-Hurd Supp. 1983). It is unclear whether the Illinois provision allowing any evidence of nonstatutory aggravating factors would survive constitutional scrutiny. Although the Supreme Court has recently exhibited a tolerance for increased capital sentencing discretion regarding aggravating circumstances, *see generally supra* notes 196-363 and accompanying text, the Court has not allowed the sentencing authority to consider *any* aggravating factor. The Illinois provision seems to directly conflict with *Furman* and its progeny, *see cases cited supra* note 25, which require that a capital sentencing authority's discretion "be suitably directed and limited." *Furman*, 428 U.S. at 189 (plurality opinion). *See supra* text accompanying notes 116-17.

rebut any evidence presented . . . and . . . present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor."⁶⁶⁰ The South Dakota law simply states that the capital sentencing "hearing shall be conducted to hear additional evidence in mitigation and aggravation of punishment."⁶⁶¹

STATUTORY AGGRAVATING CIRCUMSTANCES

Thirty-four states have capital punishment statutes that provide lists of specific aggravating circumstances weighing in favor of the death sentence.⁶⁶² These aggravating circumstances vary considerably in number and specificity from one state statute to another. In drafting post-*Furman* death penalty laws, state legislatures have focused on five broad considerations in determining which capital defendants should receive the death penalty. These considerations include the defendant's motive in committing the crime, the method or manner of the crime, the circumstances surrounding the commission of the crime, the defendant's background, and the identity of the victim.⁶⁶³

The aggravating circumstance designated in most state statutes relates to the capital offender's motive. Committing a crime for pecuniary gain or for hire is an aggravating circumstance in thirty-three states.⁶⁶⁴

⁶⁶⁰ N.J. STAT. ANN. § 2C:11-3(c)(2) (West 1982).

⁶⁶¹ S.D. CODIFIED LAWS ANN. § 23A-27A-2 (1979).

⁶⁶² ALA. CODE § 13A-5-49 (Supp. 1983); ARIZ. REV. STAT. ANN. § 13-703(F) (Supp. 1983); ARK. STAT. ANN. § 41-1303 (1977); CAL. PENAL CODE § 190.2(a) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(6) (1978 & Supp. 1983); CONN. GEN. STAT. § 53a-46a(g) (1983); DEL. CODE ANN. tit. 11, § 4209(e)(7) (1979 & Supp. 1982); FLA. STAT. ANN. § 921.141(5) (West Supp. 1983); GA. CODE § 17-10-30(b) (1982); IDAHO CODE § 19-2515(f) (1979); ILL. ANN. STAT. ch. 38, ¶ 9-1(b) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9(b) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(a) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.4 (West Supp. 1984); MD. ANN. CODE art. 27, § 413(d) (1982 & Supp. 1983); MASS. ANN. LAWS ch. 279, § 69(a) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(5) (Supp. 1983); MO. ANN. STAT. § 565.032.2 (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-303 (1983); NEB. REV. STAT. § 29-2523(1) (1979); NEV. REV. STAT. § 200.033 (1983); N.H. REV. STAT. ANN. § 630:5(II)(a) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(4) (West 1982); N.M. STAT. ANN. § 31-20A-5 (1981); N.C. GEN. STAT. § 15A-2000(e) (1983); OHIO REV. CODE ANN. § 2929.04(A) (Page 1982); OKLA. STAT. ANN. tit. 21, § 701.12 (West 1983); 42 PA. CONS. STAT. ANN. § 9711(d) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(a) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (Supp. 1983); TENN. CODE ANN. § 39-2-203(i) (1982); UTAH CODE ANN. § 76-5-202(1), 76-3-207(2) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.020 (Supp. 1984); WYO. STAT. § 6-2-102(h) (1983).

⁶⁶³ These five broad considerations are not mutually exclusive. Many of the specific factors listed by state legislatures as aggravating circumstances fall into more than one of these overlapping categories.

⁶⁶⁴ ALA. CODE § 13A-5-49(6) (Supp. 1983); ARIZ. REV. STAT. ANN. § 13-703(F) (Supp. 1983); ARK. STAT. ANN. § 41-1303(6) (1977); CAL. PENAL CODE § 190.2(a)(1) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(6)(e) (Supp. 1983) (arguably only murder for hire); CONN. GEN. STAT. § 53a-46a(g)(6) (1983); DEL. CODE ANN. tit. 11, § 4209(e)(1)(o) (Supp. 1982); FLA. STAT. ANN. § 921.141(5)(f) (West Supp. 1983); GA. CODE § 17-10-30(b)(4) (1982); IDAHO CODE § 19-2515(f)(4) (1979); ILL. ANN. STAT. ch. 38, ¶ 9-1(b)(5) (Smith-Hurd

Committing a crime to prevent a lawful arrest or effectuate an unlawful escape from custody is an aggravating circumstance in twenty-two states.⁶⁶⁵ Committing a crime to hinder or interfere with any governmental function, including the enforcement of laws, is an aggravating factor in seven states.⁶⁶⁶ In California, it is an aggravating circumstance if the "victim was intentionally killed because of his race, color, religion, nationality or country of origin."⁶⁶⁷

A second consideration is the cruelty that the defendant may have exhibited. Twenty-one states list as an aggravating circumstance that the capital offense was especially "heinous," "atrocious," "cruel," "outrageously or wantonly vile," "horrible," "inhuman," or "exceptionally brutal."⁶⁶⁸ In Florida, it is an aggravating circumstance that the de-

Supp. 1983) (only murder for hire); IND. CODE ANN. § 35-50-2-9(b)(4) (Burns Supp. 1983) (only murder for hire); KY. REV. STAT. ANN. § 532.025(2)(a)(4) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.4(e) (West Supp. 1984) (arguably only murder for hire); MD. ANN. CODE art. 27, § 413(d)(6) (1982) (only murder for hire); MASS. ANN. LAWS ch. 279, § 69(a)(5) (Michie/Law. Co-op. Supp. 1984) (only murder for hire); MISS. CODE ANN. § 99-19-101(5)(f) (Supp. 1983); MO. ANN. STAT. § 565.032.2(4) (Vernon Supp. 1984); NEB. REV. STAT. § 29-2523(1)(c) (1979); NEV. REV. STAT. § 200.033(6) (1983); N.H. REV. STAT. ANN. § 630:5(II)(a)(6) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(4)(d) (West 1982); N.M. STAT. ANN. § 31-20A-5(F) (1981) (only murder for hire); N.C. GEN. STAT. § 15A-2000(e)(6) (1983); OHIO REV. CODE ANN. § 2929.04(A)(2) (Page 1982) (only murder for hire); OKLA. STAT. ANN. tit. 21, § 701.12(3) (West 1983); 42 PA. CONS. STAT. ANN. § 9711(d)(2) (Purdon 1982) (only murder for hire); S.C. CODE ANN. § 16-3-20(C)(a)(4) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-1(3) (Supp. 1983); TENN. CODE ANN. § 39-2-203(i)(4) (1982); UTAH CODE ANN. § 76-5-202(1)(f), (1)(g) (Supp. 1983) (murder for pecuniary gain and murder for hire respectively); WASH. REV. CODE ANN. § 10.95.020(4) (only murder for hire) (Supp. 1984); WYO. STAT. § 6-2-102(h)(vi) (1983).

⁶⁶⁵ ALA. CODE § 13A-5-49(5) (Supp. 1983); ARK. STAT. ANN. § 41-1303(5) (1977); CAL. PENAL CODE § 190.2(a)(5) (West Supp. 1984); DEL. CODE ANN. tit. 11, § 4209(e)(1)(b) (1979); FLA. STAT. ANN. § 921.141(5)(e) (West Supp. 1983); GA. CODE § 17-10-30(b)(10) (1982); LA. CODE CRIM. PROC. ANN. art. 905.4(a) (West Supp. 1984); MD. ANN. CODE art. 27, § 413(d)(3) (1982); MASS. ANN. LAWS ch. 279, § 69(a)(6) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(5) (Supp. 1983); MO. ANN. STAT. § 565.032.2(10) (Vernon Supp. 1984); NEV. REV. STAT. § 200.033(5) (1983); N.H. REV. STAT. ANN. § 630:5(II)(a)(5) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(4)(t) (West 1982); N.M. STAT. ANN. § 31-20A-5(C) (1981); N.C. GEN. STAT. § 15A-2000(e)(4) (1983); OHIO REV. CODE ANN. § 2929.04(A)(3) (Page 1982); OKLA. STAT. ANN. tit. 21, § 701.12(5) (West 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-1(9) (Supp. 1983); TENN. CODE ANN. § 39-2-203(i)(6), (8) (1982); UTAH CODE ANN. § 76-5-202(1)(e) (Supp. 1983); WYO. STAT. § 6-2-102(b)(v) (1983).

⁶⁶⁶ ALA. CODE § 13A-5-49(7) (Supp. 1983); ARK. STAT. ANN. § 41-1303(7) (1977); FLA. STAT. ANN. § 921.141(5)(g) (West Supp. 1983); MISS. CODE ANN. § 99-19-101(5)(g) (Supp. 1983); NEB. REV. STAT. § 29-2523(1) (1979); N.C. GEN. STAT. § 15A-2000(e)(7) (1983); UTAH CODE ANN. § 76-5-202a(Supp. 1983).

⁶⁶⁷ CAL. PENAL CODE § 190.2(a)(16) (West Supp. 1984).

⁶⁶⁸ ALA. CODE § 13A-5-49(8) (Supp. 1983); ARIZ. REV. STAT. ANN. § 13-703(F)(6) (Supp. 1983); CAL. PENAL CODE § 190.2(a)(14) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(6)(i) (Supp. 1983); CONN. GEN. STAT. § 53a-46a(g)(4) (1983); DEL. CODE ANN. tit. 11, § 4209(e)(1)(i) (1979); FLA. STAT. ANN. § 921.141(5)(h) (West Supp. 1983); GA. CODE § 17-10-30(b)(7) (1982); IDAHO CODE § 19-2515(f)(5) (1979); LA. CODE CRIM. PROC. ANN. art. 905.4(g) (West Supp. 1984); MISS. CODE ANN. § 99-19-101(5)(h) (Supp. 1983); MO. ANN. STAT. § 565.032.2(7) (Vernon Supp. 1984); NEB. REV. STAT. § 29-2523(1)(d) (1979); N.H. REV. STAT. ANN. § 630:5(II)(a)(7) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(4)(c) (West

fendant committed the homicide "in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."⁶⁶⁹ Similarly, in Idaho, it is an aggravating circumstance that the defendant "exhibited utter disregard for human life."⁶⁷⁰ Hiring another person to commit the crime is an aggravating circumstance in seventeen states.⁶⁷¹ A finding that the defendant was lying in wait will justify the death sentence in four states.⁶⁷² Ten state statutes list torture as an aggravating circumstance.⁶⁷³ Seven state statutes designate the use of explosives as an aggravating circumstance,⁶⁷⁴ and four states list the use of poison.⁶⁷⁵

Another category of aggravating circumstances relates to the defendant's background or status at the time of the crime. The defendant's status as a prisoner at the time of the capital offense is an aggravating circumstance in twenty-four states.⁶⁷⁶ Twenty-one states

1982); N.C. GEN. STAT. § 15A-2000(e)(9) (1983); OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-1(6) (Supp. 1983); TENN. CODE ANN. § 39-2-203(i)(5) (1982); UTAH CODE ANN. § 76-5-202(1)(q) (Supp. 1983); WYO. STAT. § 6-2-102(h)(vii) (1983).

⁶⁶⁹ FLA. STAT. ANN. § 921.141(5)(i) (West Supp. 1983).

⁶⁷⁰ IDAHO CODE § 19-2515(f)(6) (1979). *See also* NEV. REV. STAT. § 200.033(g) (1983) (an aggravating circumstance where "[t]he murder was committed upon one or more persons at random and without apparent motive"); MASS. ANN. LAWS ch. 279, § 69(a)(7) (Michie/Law. Co-op. Supp. 1984) (an aggravating circumstance where the defendant "demonstrat[ed] a total disregard for the suffering of the victim").

⁶⁷¹ ARIZ. REV. STAT. ANN. § 13-703(F)(4) (Supp. 1983); CONN. GEN. STAT. § 53a-46a(g)(5) (1983); DEL. CODE ANN. tit. 11, § 4209(e)(1)(m) (Supp. 1982); GA. CODE § 17-10-30(b)(6) (1982); IDAHO CODE § 19-2515(f)(4) (1979); LA. CODE CRIM. PROC. ANN. art. 905.4(e) (West Supp. 1984); MD. ANN. STAT. art. 27, § 413(d)(7) (1982); MO. ANN. STAT. § 565.032.2(6) (Vernon Supp. 1984); NEB. REV. STAT. § 29-2523(1)(6) (1979); N.J. STAT. ANN. § 2C:11-3(c)(4)(e) (West 1982); OKLA. STAT. ANN. tit. 21, § 701.12(3) (West 1983); 42 PA. CONS. STAT. ANN. § 9711(d)(2) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(a)(6) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-1(5) (Supp. 1983); TENN. CODE ANN. § 39-2-203(i)(4) (1982); UTAH CODE ANN. § 76-5-202(1)(g) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.020(5) (Supp. 1983).

⁶⁷² CAL. PENAL CODE § 190.2(a)(15) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(f)(6) (1978); IND. CODE ANN. § 35-50-2-9(b)(3) (Burns Supp. 1983); MONT. CODE ANN. § 46-18-303(4) (1983).

⁶⁷³ CAL. PENAL CODE § 190.2(a)(18) (West Supp. 1984); DEL. CODE ANN. tit. 11, § 4209(e)(1)(l) (Supp. 1982); GA. CODE § 17-10-30(b)(7) (1982); MASS. ANN. LAWS ch. 279, § 69(a)(7) (Michie/Law. Co-op. Supp. 1984); MO. ANN. STAT. § 565.032.2(7) (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-303(3) (1983); NEV. REV. STAT. § 200.033(8) (1983); N.J. STAT. ANN. § 2C:11-3(c)(4)(c) (West 1982); 42 PA. CONS. STAT. ANN. § 9711(d)(8) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(a)(1)(i) (Law. Co-op. Supp. 1983).

⁶⁷⁴ CAL. PENAL CODE § 190.2(a)(6) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(6)(f) (1978); DEL. CODE ANN. tit. 11, § 4209(e)(2)(l) (Supp. 1982); IND. CODE ANN. § 35-50-2-9(b)(2) (Burns Supp. 1983); MASS. ANN. LAWS ch. 279, § 69(a)(9) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(5)(d) (Supp. 1983); UTAH CODE ANN. § 76-5-202(1)(l) (Supp. 1983).

⁶⁷⁵ CAL. PENAL CODE § 190.2(a)(19) (West Supp. 1984); DEL. CODE ANN. tit. 11, § 4209(e)(1)(l) (Supp. 1982); S.C. CODE ANN. § 16-3-20(C)(a)(1)(b) (Law. Co-op. Supp. 1983); UTAH CODE ANN. § 76-5-202(1)(n) (Supp. 1983).

⁶⁷⁶ ALA. CODE § 13A-5-49(1) (Supp. 1983); ARIZ. REV. STAT. ANN. § 13-703(F)(7)

designate the defendant's commission of a prior violent felony or the defendant's history of violence as an aggravating factor.⁶⁷⁷ Fourteen states specifically designate a prior murder or capital offense as an aggravating circumstance.⁶⁷⁸

Circumstances surrounding the commission of the capital offense may also warrant infliction of the death penalty. Committing the crime in connection with a separate felony of violence is an aggravating circumstance in twenty-five states.⁶⁷⁹ In Pennsylvania, it is an aggravating circumstance that the defendant committed a homicide during the per-

(Supp. 1983); ARK. STAT. ANN. § 41-1303(1) (1977); COLO. REV. STAT. § 16-11-103(6)(b) (1978); DEL. CODE ANN. tit. 11, § 4209(e)(1)(m) (Supp. 1982); FLA. STAT. ANN. § 921.141(5)(a) (West Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(a)(5) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.4(i) (West Supp. 1984); MD. ANN. CODE art. 27, § 413(d)(2) (1982); MASS. ANN. LAWS ch. 279, § 69(a)(2) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(5)(a) (Supp. 1983); MO. ANN. STAT. § 565.032.2(10) (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-303(1) (1983); NEV. REV. STAT. § 200.033 (1983); N.H. REV. STAT. ANN. § 630:5(II)(a)(1) (Supp. 1983); N.M. STAT. ANN. § 31-20A-5(D)(E) (1981); N.C. GEN. STAT. § 15A-2000(e)(1) (1983); OHIO REV. CODE ANN. § 2929.04(A)(4) (Page 1982); OKLA. STAT. ANN. tit. 21, § 701.12(6) (West 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-1(8) (Supp. 1983); TENN. CODE ANN. § 39-2-203(i)(8) (1982); UTAH CODE ANN. § 76-5-202(1)(a) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.020(3) (Supp. 1984); WYO. STAT. § 6-2-102(h)(i) (1983).

⁶⁷⁷ ALA. CODE § 13A-5-49(2) (Supp. 1983); ARIZ. REV. STAT. ANN. § 13-703(F)(2) (Supp. 1983); ARK. STAT. ANN. § 41-1303(3) (1977); CONN. GEN. STAT. § 53a-46a(g)(12) (1983); DEL. CODE ANN. tit. 11, § 4209(e)(1)(i) (1979); FLA. STAT. ANN. § 921.141(5)(b) (West Supp. 1983); GA. CODE § 17-10-30(b)(1) (1982); KY. REV. STAT. ANN. § 532.025(2)(a)(1) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.4(c) (West Supp. 1984); MISS. CODE ANN. § 99-19-101(5)(b) (Supp. 1983); MO. ANN. STAT. § 565.032.2(1) (Vernon Supp. 1984); NEB. REV. STAT. § 29-2523(1)(a) (1979); NEV. REV. STAT. § 200.033(2) (1983); N.H. REV. STAT. ANN. § 630:5(II)(a)(2) (Supp. 1983); N.C. GEN. STAT. § 15A-2000(e)(2) (1983); OKLA. STAT. ANN. tit. 21, § 701.12(1) (West 1983); 42 PA. CONS. STAT. ANN. § 9711(d)(9) (Purdon 1982); S.D. CODIFIED LAWS ANN. § 23A-27A-1(1) (Supp. 1983); TENN. CODE ANN. § 39-2-203(8)(2) (1982); UTAH CODE ANN. § 76-5-202(1)(h) (Supp. 1983); WYO. STAT. § 6-2-102(h)(ii) (1983).

⁶⁷⁸ ARIZ. REV. STAT. ANN. § 13-703(F)(1) (Supp. 1983); CAL. PENAL CODE § 190.2(a)(2) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(6)(a) (1978); GA. CODE § 17-10-30(b)(1) (1982); IDAHO CODE § 19-2515(f)(1) (1979); ILL. ANN. STAT. ch. 38, § 9-1(b)(3) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9(b)(7) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(a) (Baldwin 1983); MD. ANN. CODE art. 27, § 413(d)(8) (1982); MASS. ANN. LAWS ch. 279, § 69(a)(4) (Michie/Law. Co-op. Supp. 1984); MONT. CODE ANN. § 46-18-303(2) (1983); N.J. STAT. ANN. § 20:11-3(c)(4)(a) (West 1982); S.C. CODE ANN. § 16-3-20(C)(a)(2) (Law. Co-op. Supp. 1983); UTAH CODE ANN. § 76-5-202(1)(b) (Supp. 1983).

⁶⁷⁹ ALA. CODE § 13A-5-49(4) (Supp. 1983); CAL. PENAL CODE § 190.2(a)(17) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(6)(g) (1978); CONN. GEN. STAT. § 53a-46a(g)(1) (1983); DEL. CODE ANN. tit. 11, § 4209(e)(1)(i) (1979); FLA. STAT. ANN. § 921.141(5)(d) (West Supp. 1983); GA. CODE § 17-10-30(b)(2) (1982); ILL. ANN. STAT. ch. 38, § 9-1(b)(6) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9(b)(1) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(a)(2) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.4(a) (West Supp. 1984); MD. ANN. CODE art. 27, § 413(d)(10) (Supp. 1983); MASS. ANN. LAWS ch. 279, § 69(a)(10) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(5)(d) (Supp. 1983); MO. ANN. STAT. § 565.032.2(11) (Vernon Supp. 1984); NEV. REV. STAT. § 200.033(4) (1983); N.J. STAT. ANN. § 2C:11-3(c)(4)(g) (West 1982); N.M. STAT. ANN. § 31-20A-5(B) (1981); N.C. GEN. STAT. § 15A-2000(e)(5) (1983); OHIO REV. CODE ANN. § 2929.04(A)(7) (Page 1982); S.C. CODE ANN. § 16-3-20(C)(a)(1)(a)-(f) (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-203(i)(7) (1982); UTAH CODE ANN. § 76-5-202(1)(d) (Supp.

petration of *any* felony.⁶⁸⁰ In addition, twenty-five state statutes list as an aggravating circumstance that the defendant knowingly created a grave risk of harm to more than one or to many persons.⁶⁸¹ Kidnapping or holding the victim for ransom,⁶⁸² as a hostage,⁶⁸³ or as a shield⁶⁸⁴ are also aggravating circumstances in some states.

The fifth type of statutory aggravating circumstance focuses on the victims of capital crimes. Twenty-six states deem it an aggravating circumstance if the victim was a police officer, fireman, or corrections employee.⁶⁸⁵ Sixteen states make it an aggravating factor if the victim was

1983); WASH. REV. CODE ANN. § 10.95.020(9) (Supp. 1984); WYO. STAT. § 6-2-102(h)(iv) (1983).

⁶⁸⁰ 42 PA. CONS. STAT. ANN. § 9711(d)(6) (Purdon 1982).

⁶⁸¹ ALA. CODE § 13A-5-49(3) (Supp. 1983); ARIZ. REV. STAT. ANN. § 13-703(F)(3) (Supp. 1983); ARK. STAT. ANN. § 41-1303(4) (1977); COLO. REV. STAT. § 16-11-103(6)(h) (Supp. 1983); CONN. GEN. STAT. § 53a-46a(g)(3) (1983); FLA. STAT. ANN. § 921.141(5)(c) (West Supp. 1983); GA. CODE § 17-10-30(b)(3) (1982); IDAHO CODE § 19-2515(f)(3) (1979); KY. REV. STAT. ANN. § 532.025(2)(a)(3) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.4(d) (West Supp. 1984); MASS. ANN. LAWS ch. 279, § 69(a)(8) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(5)(c) (Supp. 1983); MO. ANN. STAT. § 565.032.2(3) (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-303(5) (1983); NEB. REV. STAT. § 29-2523(1)(f) (1979); NEV. REV. STAT. § 200.033(3) (1983); N.H. REV. STAT. ANN. § 630:5(II)(a)(4) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(4)(b) (West 1982); N.C. GEN. STAT. § 15A-2000(e)(10) (1983); OKLA. STAT. ANN. tit. 21, § 701.12(2) (West 1983); 42 PA. CONS. STAT. ANN. § 9711(d)(7) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(a)(3) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-1(2) (Supp. 1983); UTAH CODE ANN. § 76-5-202(1)(c) (Supp. 1983); WYO. STAT. § 6-2-102(h)(iii) (1983).

⁶⁸² COLO. REV. STAT. § 16-11-103(6)(d) (1978); DEL. CODE ANN. tit. 11, § 4209(e)(1)(e) (1979); MD. ANN. CODE art. 27, § 413(d)(4) (Supp. 1983); MONT. CODE ANN. § 46-18-303(7) (1983); 42 PA. CONS. STAT. ANN. § 9711(d)(3) (Purdon 1982); UTAH CODE ANN. § 76-5-202(1)(o) (Supp. 1983).

⁶⁸³ COLO. REV. STAT. § 16-11-103(6)(d) (1978); DEL. CODE ANN. tit. 11, § 4209(e)(1)(e) (1979); 42 PA. CONS. STAT. ANN. § 9711(d)(3) (Purdon 1982); UTAH CODE ANN. § 76-5-202(1)(o) (Supp. 1983).

⁶⁸⁴ DEL. CODE ANN. tit. 11, § 4209(e)(1)(e) (1979); 42 PA. CONS. STAT. ANN. § 9711(d)(3) (Purdon 1982); UTAH CODE ANN. § 76-5-202(1)(o) (Supp. 1983).

⁶⁸⁵ CAL. PENAL CODE § 190.2(a)(7)-(9) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(6)(c) (1978); DEL. CODE ANN. tit. 11, § 4209(e)(1)(e) (1979); GA. CODE § 17-10-30(b)(8) (1982); IDAHO CODE § 19-2515(f)(9) (1979); ILL. ANN. STAT. ch. 38, § 9-1(b)(1) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9(b)(6) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(a)(7) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.4(b), (i) (West Supp. 1984); MD. ANN. CODE art. 27, § 413(d)(1) (1982); MASS. ANN. LAWS ch. 279, § 69(a)(1) (Michie/Law. Co-op. Supp. 1984); MO. ANN. STAT. § 565.032.2(8), (13) (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-303(6) (1983); NEB. REV. STAT. § 29-2523(1)(g) (1979); NEV. REV. STAT. § 200.033(7) (1983); N.J. STAT. ANN. § 2C:11-3(c)(4)(h) (West 1982); N.M. STAT. ANN. § 31-20A-5(A), (E) (1981); N.C. GEN. STAT. § 15A-2000(e)(8) (1983); OHIO REV. CODE ANN. § 2929.04(A)(6) (Page 1982); OKLA. STAT. ANN. tit. 21, § 701.12 (West 1983); 42 PA. CONS. STAT. ANN. § 9711(d)(1) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(a)(7) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-1(7) (Supp. 1983); TENN. CODE ANN. § 39-2-203(i)(9) (1982); UTAH CODE ANN. § 76-5-202(1)(k) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.020(1) (Supp. 1984).

These formulations differ considerably from state to state. Some state statutes include only police officers killed in the line of duty, some include former police officers, and some broadly define "peace officer" or "public servant." Most states include firefighters. Several state statutes expressly include elected officials. Only Ohio specifically provides that the as-

a judge or prosecutor targeted because he was carrying out his official duties.⁶⁸⁶ Thirteen states designate as an aggravating circumstance that the victim was or would have been a witness against the defendant in some legal proceeding.⁶⁸⁷ Finally, the fact that the capital offense involved multiple victims is an aggravating circumstance in ten states.⁶⁸⁸ Tennessee, for example, will sentence a defendant to death if he has committed "mass murder,"⁶⁸⁹ unless the sentencing authority finds sufficient mitigating circumstances to outweigh the aggravating factor.⁶⁹⁰

STATUTORY MITIGATING CIRCUMSTANCES

The capital punishment statutes in thirty states provide lists of mitigating circumstances in addition to enumerated aggravating circumstances.⁶⁹¹ The Supreme Court's decisions in *Lockett v. Ohio*⁶⁹² and *Ed-*

sassination of the President of the United States shall be an aggravating circumstance. OHIO REV. CODE ANN. § 2929.04(A)(1) (Page 1982). Some state statutes also include visitors to correctional facilities. In Washington it is an aggravating circumstance if the victim was a "newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim." WASH. REV. CODE ANN. § 10.95.020(10) (Supp. 1984).

⁶⁸⁶ CAL. PENAL CODE § 190.2(a)(11)-(12) (West Supp. 1984); DEL. CODE ANN. tit. 11, § 4209(e)(1)(d) (1979); GA. CODE § 17-10-30(b)(5) (1982); IDAHO CODE § 19-2515(f)(9) (1979); IND. CODE ANN. § 35-50-2-9(b)(6) (Burns Supp. 1983); MASS. ANN. LAWS ch. 279, § 69(a)(3) (Michie/Law Co-op. Supp. 1984); MO. ANN. STAT. § 565.032.2(5) (Vernon Supp. 1984); N.J. STAT. ANN. § 2C:11-3(c)(4)(g) (West 1982); N.C. GEN. STAT. § 15A-2000(e)(8) (1983); 42 PA. CONS. STAT. ANN. § 9711(d)(1) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(a)(5) (Law Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-1(4) (Supp. 1983); TENN. CODE ANN. § 39-2-203(i)(10) (1982); UTAH CODE ANN. § 76-5-202(1)(k) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.020(6) (Supp. 1984); WYO. STAT. § 6-2-102(h)(viii) (1983).

⁶⁸⁷ CAL. PENAL CODE § 190.2(a)(10) (West Supp. 1984); DEL. CODE ANN. tit. 11, § 4209(e)(1)(g) (Supp. 1984); IDAHO CODE § 19-2515(f)(10) (1979); ILL. ANN. STAT. ch. 38, ¶ 9-1(b)(8) (Smith-Hurd Supp. 1983); LA. CODE CRIM. PROC. ANN. art. 905.4(b) (West Supp. 1984); MASS. ANN. LAWS ch. 279, § 69(a)(3) (Michie/Law Co-op. Supp. 1984); MO. ANN. STAT. § 565.032.2(12) (Vernon Supp. 1984); N.M. STAT. ANN. § 31-20A-5(G) (1981); N.C. GEN. STAT. § 15A-2000(e)(8) (1983); OHIO REV. CODE ANN. § 2929.04(A)(8) (Page 1982); 42 PA. CONS. STAT. ANN. § 9711(d)(5) (Purdon 1982); UTAH CODE ANN. § 76-5-202(1)(i) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.020(6) (Supp. 1983).

⁶⁸⁸ CAL. PENAL CODE § 190.2(a)(3) (West Supp. 1984); DEL. CODE ANN. tit. 11, § 4209(e)(1)(k) (1979); IDAHO CODE § 19-2515(f)(2) (1979); ILL. ANN. STAT. ch. 38, ¶ 9-1(b)(3) (Smith-Hurd Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(a)(6) (Baldwin 1983); MD. ANN. CODE art. 27, § 413(d)(9) (1982); NEB. REV. STAT. § 29-2523(1)(e) (1979); TENN. CODE ANN. § 39-2-203(i)(12) (1982); UTAH CODE ANN. § 76-5-202(1)(b) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.020(8) (Supp. 1984).

⁶⁸⁹ TENN. CODE ANN. § 39-2-203(i)(12) (1982) (defining "mass murder" as the "murder of three or more persons within the state . . . within a period of forty-eight months").

⁶⁹⁰ TENN. CODE ANN. § 39-2-203(g), (g)(2) (1982).

⁶⁹¹ ALA. CODE § 13A-5-51 (1982); ARIZ. REV. STAT. ANN. § 13-703(G) (Supp. 1983); ARK. STAT. ANN. § 41-1304 (1977); CAL. PENAL CODE § 190.3 (West Supp. 1984); COLO. REV. STAT. § 16-11-103(5), (5.1) (1978 & Supp. 1983); CONN. GEN. STAT. § 53a-46a(f) (1983); FLA. STAT. ANN. § 921.141(6) (West Supp. 1983); ILL. ANN. STAT. ch. 38, ¶ 9-1(C) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9(c) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(b) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.5 (West

*dings v. Oklahoma*⁶⁹³ established that capital sentencing authorities may not be precluded from considering every possible mitigating factor that the defendant presents.⁶⁹⁴ As a result, state death penalty statutes listing mitigating circumstances must indicate that such statutory lists are nonexclusive and do not limit the sentencing authority in its consideration of other factors weighing against imposition of the death penalty.⁶⁹⁵ Therefore, the lists of aggravating and mitigating circumstances now serve different functions. The former define permissible areas of consideration; the latter merely suggest legitimate grounds for leniency.

A greater consensus exists among the states concerning proper mitigating circumstances than exists regarding aggravating circumstances. Twenty-eight states agree that leniency may be warranted if the capital defendant acted under substantial duress or the domination of another person.⁶⁹⁶ Twenty-seven states also agree that the defendant's age at the time of the crime is relevant to the sentencing decision.⁶⁹⁷ Although the

Supp. 1984); MD. ANN. CODE art. 27, § 413(g) (Supp. 1983); MASS. ANN. LAWS ch. 279, § 69(b) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(6) (Supp. 1983); MO. ANN. STAT. § 565.032.3 (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-304 (1983); NEB. REV. STAT. § 29-2523(2) (1979); NEV. REV. STAT. § 200.035 (1983); N.H. REV. STAT. ANN. § 630:5(II)(b) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(5) (West 1982); N.M. STAT. ANN. § 31-20A-6 (1981); N.C. GEN. STAT. § 15A-2000(f) (1983); OHIO REV. CODE ANN. § 2929.04(B) (Page 1982); 42 PA. CONS. STAT. ANN. § 9711(e) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(b) (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-203(j) (1982); UTAH CODE ANN. § 76-3-207(1) (Supp. 1983); VA. CODE § 19.2-264.4(B) (1983); WASH. REV. CODE ANN. § 10.95.070 (Supp. 1984); WYO. STAT. § 6-2-102(j) (1983).

⁶⁹² 438 U.S. 586 (1978).

⁶⁹³ 455 U.S. 104 (1982).

⁶⁹⁴ See *supra* notes 157-58, 161-62, 171-72 and accompanying text.

⁶⁹⁵ For an argument that nonexclusive lists of statutory mitigating circumstances should be constitutionally required, see *supra* note 185.

⁶⁹⁶ ALA. CODE § 13A-5-51(5) (1982); ARIZ. REV. STAT. ANN. § 13-703(G)(2) (Supp. 1983); ARK. STAT. ANN. § 41-1304(2) (1977); CAL. PENAL CODE § 190.3(g) (West Supp. 1984); CONN. GEN. STAT. § 53a-46a(f)(3) (1983); FLA. STAT. ANN. § 921.141(6)(e) (West Supp. 1983); ILL. ANN. STAT. ch. 38, § 9-1(C)(4) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9(c)(5) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(b)(6) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.5(c) (West Supp. 1984); MD. ANN. CODE art. 27, § 413(g)(3) (Supp. 1983); MASS. ANN. LAWS ch. 279, § 69(b)(3) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(6)(e) (Supp. 1983); MO. ANN. STAT. § 565.032.3(5) (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-304(3) (1983); NEB. REV. STAT. § 29-2523(2)(b) (1979); NEV. REV. STAT. § 200.035(5) (1983); N.H. REV. STAT. ANN. § 630:5(II)(b)(3) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(5)(e) (West 1982); N.M. STAT. ANN. § 31-20A-6(B) (1981); N.C. GEN. STAT. § 15A-2000(f)(5) (1983); OHIO REV. CODE ANN. § 2929.04(B) (Page 1982); 42 PA. CONS. STAT. ANN. § 9711(e)(5) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(b)(5) (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-203(j)(6) (1982); UTAH CODE ANN. § 76-3-207(2)(c) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.070(5) (Supp. 1984); WYO. STAT. § 6-2-102(j)(v) (1983).

⁶⁹⁷ ALA. CODE § 13A-5-51(7) (1982); ARIZ. REV. STAT. ANN. § 13-703(G)(5) (Supp. 1983); CAL. PENAL CODE § 190.3(i) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(5)(a) (1978 & Supp. 1983); CONN. GEN. STAT. § 53a-46a(f)(1) (1983); FLA. STAT. ANN. § 921.141(6)(g) (West Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(b)(8) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.5(f) (West Supp. 1984); MD. ANN. CODE art. 27, § 413(g)(5) (Supp. 1983); MASS. ANN. LAWS ch. 279, § 69(b)(5) (Michie/Law. Co-op. Supp.

majority of states only list "age," some states define the age factor more narrowly as consideration of the defendant's "youth."⁶⁹⁸ In contrast, Tennessee provides that the sentencing authority shall consider the "youth or advanced age of the defendant at the time of the crime" in mitigation of the penalty.⁶⁹⁹ The Massachusetts law designates as a mitigating circumstance that "the defendant was over the age of seventy-five at the time of the murder,"⁷⁰⁰ and recommends that the sentencing authority consider "any other relevant consideration regarding the age of the defendant."⁷⁰¹ In Colorado and Ohio, a person under age eighteen can never be sentenced to death.⁷⁰²

In twenty-eight of thirty statutes listing specific mitigating factors, the fact that the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was substantially impaired when he committed the crime weighs against imposition of the death penalty.⁷⁰³ Fourteen of these statutes do not spec-

1984); MISS. CODE ANN. § 99-19-101(6)(g) (Supp. 1983); MO. ANN. STAT. § 565.032.3(7) (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-304(7) (1983); NEB. REV. STAT. § 29-2523(2)(d) (1979); NEV. REV. STAT. § 200.035(6) (1983); N.H. REV. STAT. ANN. § 630:5(II)(b)(5) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(5)(c) (West 1982); N.M. STAT. ANN. § 31-20A-6(f) (1981); N.C. GEN. STAT. § 15A-2000(f)(7) (1983); OHIO REV. CODE ANN. § 2929.04(B)(4) (Page 1982); 42 PA. CONS. STAT. ANN. § 9711(e)(4) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(b)(7) (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-203(j)(7) (1982); UTAH CODE ANN. § 26-3-207(2)(e) (Supp. 1983); VA. CODE § 19.2-264.4(B)(v) (1983); WASH. REV. CODE ANN. § 10.95.070(7) (Supp. 1984); WYO. STAT. § 6-2-102(j)(vii) (1983).

⁶⁹⁸ CONN. GEN. STAT. § 53a-46a(f)(1) (1983); KY. REV. STAT. ANN. § 532.025(2)(b)(8) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.5(f) (West Supp. 1984); MD. ANN. CODE art. 27, § 413(g)(5) (Supp. 1983); NEV. REV. STAT. § 200.035(6) (1983); N.H. REV. STAT. ANN. § 630:5(II)(b)(5) (Supp. 1983); OHIO REV. CODE ANN. § 2929.04(b)(4) (Page 1982); UTAH CODE ANN. § 76-3-207(2)(e) (Supp. 1983). In Montana, it is a separate mitigating circumstance if the defendant is under age 18. MONT. CODE ANN. § 46-18-304(7) (1983).

⁶⁹⁹ TENN. CODE ANN. § 39-2-203(j)(7) (1982).

⁷⁰⁰ MASS. ANN. LAWS ch. 279, § 69(b)(5) (Michie/Law. Co-op. Supp. 1984).

⁷⁰¹ *Id.*

⁷⁰² COLO. REV. STAT. § 16-11-103(5)(a) (1978); OHIO REV. CODE ANN. § 2929.03(D)(1) (Page 1982).

⁷⁰³ ALA. CODE 13A-5-51(6) (1982); ARIZ. REV. STAT. ANN. § 13-703(G)(1) (Supp. 1983); ARK. STAT. ANN. § 41-1304(3) (1977); CAL. PENAL CODE § 190.3(h) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(5)(b) (1978); CONN. GEN. STAT. § 53a-46a(f)(2) (1983); FLA. STAT. ANN. § 921.141(6)(f) (West Supp. 1983); IND. CODE ANN. § 35-50-2-9(c)(6) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(b)(7) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.5(e) (West Supp. 1984); MD. ANN. CODE art. 27, § 413(g)(4) (Supp. 1983); MASS. ANN. LAWS ch. 279, § 69(b)(4) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(6)(f) (Supp. 1983); MO. ANN. STAT. § 565.032.3(6) (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-304(4) (1983); NEB. REV. STAT. § 29-2523(2)(g) (1979); N.H. REV. STAT. ANN. § 630:5(II)(b)(4) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(5)(d) (West 1982); N.M. STAT. ANN. § 31-20A-6(C) (1981); N.C. GEN. STAT. § 15A-2000(f)(6) (1983); OHIO REV. CODE ANN. § 2929.04(B)(3) (Page 1982); 42 PA. CONS. STAT. ANN. § 9711(e)(3) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(b)(6) (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-203(j)(8) (1982); UTAH CODE ANN. § 76-3-207(2)(d) (Supp. 1983); VA. CODE § 19.2-264.4(B)(iv) (1983); WASH. REV. CODE ANN. § 10.95.070(6) (Supp. 1984); WYO. STAT. § 6-2-102(j)(vi) (1983).

ify the causes of such impairment.⁷⁰⁴ Of the more precise statutes, thirteen name substantial impairment due to mental disease or defect,⁷⁰⁵ eleven include intoxication,⁷⁰⁶ and only four include drug abuse.⁷⁰⁷ Acting under the influence of extreme mental or emotional disturbance is a mitigating factor in twenty-five states.⁷⁰⁸ Massachusetts recognizes as a mitigating circumstance that "the defendant was experiencing post-traumatic stress syndrome caused by military service during a declared or undeclared war."⁷⁰⁹ Some states recognize as a mitigating factor that the capital defendant reasonably believed that his criminal conduct was morally justified.⁷¹⁰ It is a mitigating circum-

⁷⁰⁴ ALA. CODE § 13A-5-51(6) (1982); ARIZ. REV. STAT. ANN. § 13-703(G)(1) (Supp. 1983); CONN. GEN. STAT. § 53a-46a(f)(2) (1983); FLA. STAT. ANN. § 921.141(6)(f) (West Supp. 1983); MISS. CODE ANN. § 99-19-101(6)(f) (Supp. 1983); MO. ANN. STAT. § 565.032.3(6) (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-304(4) (1983); N.H. REV. STAT. ANN. § 630:5(II)(b)(4) (Supp. 1983); N.M. STAT. ANN. § 31-20A-6(C) (1981); N.C. GEN. STAT. § 15A-2000(f)(6) (1983); 42 PA. CONS. STAT. ANN. § 9711(e)(3) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(b)(6) (Law. Co-op. Supp. 1983); VA. CODE § 19.2-264.4(B)(iv) (1983); WYO. STAT. § 6-2-102(j)(vi) (1983).

⁷⁰⁵ ARK. STAT. ANN. § 41-1304(3) (1977); CAL. PENAL CODE § 190.3(h) (West Supp. 1984); IND. CODE ANN. § 35-50-2-9(c)(6) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(b)(7) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.5(e) (West Supp. 1984); MD. ANN. CODE art. 27, § 413(g)(4) (Supp. 1983); MASS. ANN. LAWS ch. 279, § 69(b)(4) (Michie/Law Co-op. Supp. 1984); NEB. REV. STAT. § 29-2523(2)(g) (1979); N.J. STAT. ANN. § 2C:11-3(c)(5)(d) (West 1982); OHIO REV. CODE ANN. § 2929.04(B)(3) (Page 1982); TENN. CODE ANN. § 39-2-203(j)(8) (1982); UTAH CODE ANN. § 76-3-207(2)(d) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.070(6) (Supp. 1984).

⁷⁰⁶ ARK. STAT. ANN. § 41-1304(3) (1977); CAL. PENAL CODE § 190.3(h) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(5.1)(b) (Supp. 1983); IND. CODE ANN. § 35-50-2-9(c)(6) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(b)(7) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.5(e) (West Supp. 1984); MASS. ANN. LAWS ch. 279, § 69(b)(4) (Michie/Law Co-op. Supp. 1984); NEB. REV. STAT. § 29-2523(2)(g) (1979); N.J. STAT. ANN. § 2C:11-3(c)(5)(d) (West 1982); TENN. CODE ANN. § 39-2-203(j)(8) (1982); UTAH CODE ANN. § 76-3-207(2)(d) (Supp. 1983).

⁷⁰⁷ ARK. STAT. ANN. § 41-1304(3) (1977); COLO. REV. STAT. § 16-11-103(5.1)(b) (Supp. 1983); MASS. ANN. LAWS ch. 279, § 69(b)(4) (Michie/Law Co-op. Supp. 1984); UTAH CODE ANN. § 76-3-207(2)(d) (Supp. 1983).

⁷⁰⁸ ALA. CODE § 13A-5-51(2) (1982); ARK. STAT. ANN. § 41-1304(1) (1977); CAL. PENAL CODE § 190.3(d) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(5.1)(a) (Supp. 1983); FLA. STAT. ANN. § 921.141(6)(b) (West Supp. 1983); ILL. ANN. STAT. ch. 38, ¶ 9-1(C)(2) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9(c)(2) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(b)(2) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.5(b) (West Supp. 1984); MISS. CODE ANN. § 99-19-101(6)(b) (Supp. 1983); MO. ANN. STAT. § 565.032.3(2) (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-304(2) (1983); NEB. REV. STAT. § 29-2523(2)(c) (1979); NEV. REV. STAT. § 200.035(2) (1983); N.H. REV. STAT. ANN. § 630:5(II)(b)(2) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(5)(a) (West 1982); N.M. STAT. ANN. § 31-20A-6(D) (1981); N.C. GEN. STAT. § 15A-2000(f)(2) (1983); 42 PA. CONS. STAT. ANN. § 9711(e)(2) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(b)(2) (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-203(j)(2) (1982); UTAH CODE ANN. § 76-3-207(2) (Supp. 1983); VA. CODE § 19.2-264.4(B)(ii) (1983); WASH. REV. CODE ANN. § 10.95.070(2) (Supp. 1984); WYO. STAT. § 6-2-102(j)(ii) (1983).

⁷⁰⁹ MASS. ANN. LAWS ch. 279, § 69(b)(7) (Michie/Law Co-op. Supp. 1984).

⁷¹⁰ CAL. PENAL CODE § 190.3(f) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(5.1)(e) (Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(b)(4) (Baldwin 1983); LA. CODE

stance in twenty-one states that, although the capital defendant was an accomplice to the offense, his participation in its commission was relatively minor.⁷¹¹ Twenty-one states recognize the victim's participation in the crime or consent to the criminal conduct as a mitigating factor.⁷¹² Only four state statutes list the defendant's cooperation with law enforcement authorities after the commission of the capital offense as a mitigating circumstance.⁷¹³ Four states also list as a mitigating circumstance the unlikelihood that the defendant will engage in future acts of criminal violence.⁷¹⁴ Finally, twenty-eight of thirty statutes specifying mitigating factors suggest leniency when the capital offender has no sig-

CRIM. PROC. ANN. art. 905.5(d) (West Supp. 1984); TENN. CODE ANN. § 39-2-203(j)(4) (1982). The New Mexico statute lists as a mitigating factor that the defendant "acted under circumstances which tended to justify or excuse" his conduct. N.M. STAT. ANN. § 31-20A-6(F) (1981). Ohio is the only state that expressly recognizes provocation as a mitigating circumstance. OHIO REV. CODE ANN. § 2929.04(B)(2) (Page 1982).

⁷¹¹ ALA. CODE § 13A-5-51(4) (1982); ARIZ. REV. STAT. ANN. § 13-703(G)(3) (Supp. 1983); ARK. STAT. ANN. § 41-1304(1) (1977); CAL. PENAL CODE § 190.3(j) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(5)(d) (1978); CONN. GEN. STAT. § 53a-46a(f)(4) (1983); FLA. STAT. ANN. § 921.141(6)(d) (West Supp. 1983); IND. CODE ANN. § 35-50-2-9(c)(4) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(b)(5) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.5(g) (West Supp. 1984); MO. ANN. STAT. § 565.012.3 (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-304(6) (1983); NEB. REV. STAT. § 29-2523(2)(e) (1979); N.C. GEN. STAT. § 15A-2000(f)(4) (1983); OHIO REV. CODE ANN. § 2929.04(B)(6) (Page 1982); 42 PA. CONS. STAT. ANN. § 9711(e)(7) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(b)(4) (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-203(j)(5) (1982); UTAH CODE ANN. § 76-3-207(2)(f) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.070(4) (Supp. 1984); WYO. STAT. § 6-2-102(j)(iv) (1983).

In Illinois, it is a mitigating circumstance that the capital defendant was not present at the scene of the murder. ILL. ANN. STAT. ch. 38, § 9-1(c)(5) (Smith-Hurd Supp. 1983). In Maryland, leniency may be warranted if the defendant's act was not "the sole proximate cause of the victim's death." MD. ANN. CODE art. 27, § 413(g)(6) (Supp. 1983).

⁷¹² ALA. CODE § 13A-5-51(3) (1982); FLA. STAT. ANN. § 921.141(6)(c) (West Supp. 1983); ILL. ANN. STAT. ch. 38, § 9-1(c)(3) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9(c)(3) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(b)(3) (Baldwin 1983); MD. ANN. CODE art. 27, § 413(g)(2) (Supp. 1983); MASS. ANN. LAWS ch. 279, § 69(b)(2) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(6)(c) (Supp. 1983); MO. ANN. STAT. § 565.032.3(3) (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-304(5) (1983); NEB. REV. STAT. § 29-2523(2)(f) (1979); NEV. REV. STAT. § 200.035(3) (1983); N.J. STAT. ANN. § 2C:11-3(c)(5)(b) (West 1982); N.M. STAT. ANN. § 31-20A-6(E) (1981); N.C. GEN. STAT. § 15A-2000(f)(3) (1983); 42 PA. CONS. STAT. ANN. § 9711(e)(6) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C)(b)(3) (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-203(j)(3) (1982); VA. CODE § 19.2-264.4(B)(iii) (1983); WASH. REV. CODE ANN. § 10.95.070(3) (Supp. 1984); WYO. STAT. § 6-2-102(j)(iii) (1983).

Ohio's statute includes as a mitigating circumstance that the victim "facilitated" the capital offense. OHIO REV. CODE ANN. § 2929.04(B)(1) (Page 1982).

⁷¹³ COLO. REV. STAT. § 16-11-103(5.1)(c) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(5)(g) (West 1982); N.M. STAT. ANN. § 31-20A-6(H) (1981); N.C. GEN. STAT. § 15A-2000(f)(8) (1983).

⁷¹⁴ COLO. REV. STAT. § 16-11-103(5.1)(g) (Supp. 1983); MD. ANN. CODE art. 27, § 413(g)(7) (Supp. 1983); N.M. STAT. ANN. § 31-20A-6(G) (1981); WASH. REV. CODE ANN. § 10.95.070(8) (Supp. 1984). For an argument that inquiries into a capital defendant's future dangerousness should not be permitted, see *supra* note 350.

nificant history of prior criminal activity.⁷¹⁵

THE SENTENCING AUTHORITY

Although all states with valid death penalty laws now provide for separate sentencing stages in capital cases,⁷¹⁶ the identity of the sentencing authority may differ from one jurisdiction to another. Where a jury convicted the capital defendant, most states provide that the same jury shall remain empaneled for the penalty stage.⁷¹⁷ If it is impracticable for the same jury to sit again for the purpose of sentencing, a number of states provide that a new jury shall be specially selected for that purpose.⁷¹⁸ When the defendant has pled guilty or has been tried without a

⁷¹⁵ ALA. CODE § 13A-5-51(11) (1982); ARK. STAT. ANN. § 41-1304(6) (1977); CAL. PENAL CODE § 190.3(b)-(c) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(5.1)(b) (Supp. 1983); FLA. STAT. ANN. § 921.141(6)(a) (West Supp. 1983); ILL. ANN. STAT. ch. 38, ¶ 9-1(c)(1) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9(c)(1) (Burns Supp. 1983); KY. REV. STAT. ANN. § 532.025(2)(b)(1) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.5(a) (West Supp. 1984); MD. ANN. CODE art. 27, § 413(g)(1) (Supp. 1983); MASS. ANN. LAWS ch. 279, § 69(b)(1) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(6)(a) (Supp. 1983); MO. ANN. STAT. § 565.032.3(1) (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-304(1) (1983); NEB. REV. STAT. § 29-2523(2)(a) (1979); NEV. REV. STAT. § 200.035(1) (1983); N.H. REV. STAT. ANN. § 630:5(II)(b)(1) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(5)(f) (West 1982); N.M. STAT. ANN. § 31-20A-6(A) (1981); N.C. GEN. STAT. § 15A-2000(f)(1) (1983); OHIO REV. CODE ANN. § 2929.04(B)(5) (Page 1982); 42 PA. CONS. STAT. ANN. § 9711(e)(1) (Purdon 1982); S.C. CODE ANN. 16-3-20(C)(b)(1) (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-203(j)(1) (1982); UTAH CODE ANN. § 76-3-207(2)(a) (Supp. 1983); VA. CODE § 19.2-264.4(B)(i) (1983); WASH. REV. CODE ANN. § 10.95.070(1) (Supp. 1984); WYO. STAT. § 6-2-102(j)(i) (1983).

⁷¹⁶ See *supra* note 643 and accompanying text.

⁷¹⁷ ALA. CODE § 13A-5-46(b) (1982); ARK. STAT. ANN. § 41-1301(3) (1977); CAL. PENAL CODE § 190.4(c) (West Supp. 1984); COLO. REV. STAT. § 16-11-103(1) (1978); CONN. GEN. STAT. § 53a-46a(b)(1) (1983); DEL. CODE ANN. tit. 11, § 4209(b)(1) (1979); FLA. STAT. ANN. § 921.141(1) (West Supp. 1983); GA. CODE § 17-10-2(c) (1982); ILL. STAT. ANN. ch. 38, ¶ 9-1(d)(1) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9(d) (Burns Supp. 1983); KY. REV. STAT. ANN. § 535.025(1)(b) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.1(A) (West Supp. 1984); MD. ANN. CODE art. 27, § 413(b)(1) (1982); MASS. ANN. LAWS ch. 279, § 68 (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(1) (Supp. 1983); MO. ANN. STAT. § 565.030.2 (Vernon Supp. 1984); NEV. REV. STAT. § 175.552 (1983); N.H. REV. STAT. ANN. § 630:5(II) (Supp. 1983); N.J. STAT. ANN. § 2C:II-3(c)(1) (West 1982); N.M. STAT. ANN. § 31-20A-1(B) (1981); N.C. GEN. STAT. § 15A-2000(a)(2) (1983); OKLA. STAT. ANN. tit. 21, § 701.10 (West 1983); 42 PA. CONS. STAT. ANN. § 9711(a)(1) (Purdon 1982); S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-2 (1979); TENN. CODE ANN. § 39-2-203(a) (1982); TEX. CODE CRIM. PROC. ANN. art. 37.071(a) (Vernon 1981); UTAH CODE ANN. § 76-3-207(1) (Supp. 1983); VA. CODE § 19.2-264.3(C) (1983); WASH. REV. CODE ANN. § 10.95.060(3) (Supp. 1984); WYO. STAT. § 6-2-102(b) (1983).

⁷¹⁸ ALA. CODE § 13A-5-46(b) (1982); CAL. PENAL CODE § 190.4(c) (West Supp. 1984); CONN. GEN. STAT. § 53a-46a(b)(2)(C) (West Supp. 1983); DEL. CODE ANN. tit. 11, § 4209(b)(1) (1979); FLA. STAT. ANN. § 921.141(1) (West Supp. 1983); ILL. ANN. STAT. ch. 38, ¶ 9-1(d)(2)(C) (Smith-Hurd Supp. 1983); LA. CODE CRIM. PROC. ANN. art. 905.1(B) (West Supp. 1984); MD. ANN. CODE art. 27, § 413(b)(2)(iii)-(iv) (1982); MASS. ANN. LAWS ch. 279, § 68 (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(1) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(1) (West 1982); N.C. GEN. STAT. § 15A-2000(a)(2) (1983);

jury, some states provide for a jury at the sentencing proceeding.⁷¹⁹ Other states provide that the trial judge shall preside at the sentencing stage where there was no trial jury.⁷²⁰ In Nebraska, Nevada, and Ohio, a panel of three judges determines the sentence in cases where the capital defendant was convicted without a jury.⁷²¹ In Arizona, Idaho, and Montana, the penalty hearing is conducted before the court alone, regardless of whether a jury determined the defendant's guilt.⁷²²

THE SENTENCING DECISION

The majority of capital punishment laws require the sentencing authority to weigh aggravating circumstances against mitigating circumstances in determining whether to impose the death penalty.⁷²³ In Idaho, for example, the statute provides that "[w]here the [sentencing authority] finds a statutory aggravating circumstance [it] shall sentence the defendant to death unless [it] finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating cir-

UTAH CODE ANN. § 76-3-207(1) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.050(3) (Supp. 1984); WYO. STAT. § 6-2-102(b) (1983).

⁷¹⁹ ALA. CODE § 13A-5-46(a) (1982); CAL. PENAL CODE § 190.4(b) (West Supp. 1984); CONN. GEN. STAT. § 53a-46a(b)(2)(A) (1983); DEL. CODE ANN. tit. 11, § 4209(b)(2) (1979); FLA. STAT. ANN. § 921.141(1) (West Supp. 1983); ILL. ANN. STAT. ch. 38, § 9-1(d)(2)(A)-(B) (Smith-Hurd Supp. 1983); MD. ANN. CODE art. 27, § 413(b)(3) (Supp. 1983); MISS. CODE ANN. § 99-19-101(1) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(1) (West 1982); N.C. GEN. STAT. § 15A-2000(a)(2) (1983); 42 PA. CONS. STAT. ANN. § 9711(b) (Purdon 1982); WASH. REV. CODE ANN. § 10.95.060(4) (Supp. 1984). In New Mexico, Utah, and Wyoming, a defendant who has pled guilty to a capital offense may choose whether to have the sentencing proceeding conducted by the trial court or by a jury. N.M. STAT. ANN. § 31-20A-1(B) (1981); UTAH CODE ANN. § 76-3-207(1) (Supp. 1983); WYO. STAT. § 6-2-102(a)(i)-(ii) (1983).

⁷²⁰ COLO. REV. STAT. § 16-11-103(1) (1978); GA. CODE § 17-10-32 (1982); IND. CODE ANN. § 35-50-2-9(d) (Burns Supp. 1983); KY. REV. STAT. ANN. § 535.025(1), (3) (Baldwin 1983); MO. ANN. STAT. § 565.006.2 (Vernon Supp. 1984); OKLA. STAT. ANN. tit. 21, § 701.10 (West 1983); S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. Supp. 1983); WYO. STAT. § 6-2-102(a)(i) (1983).

⁷²¹ NEB. REV. STAT. § 29-2520, 29-2522 (1979) (determination shall be made by panel of three judges if presiding judge who accepts pleas of guilty so requests); NEV. REV. STAT. § 175.552 (1983); OHIO REV. CODE ANN. § 2929.03(C)(2)(a) (Page 1982).

⁷²² ARIZ. REV. STAT. ANN. § 13-703(B) (Supp. 1983); IDAHO CODE § 19-2515(b) (1979); MONT. CODE ANN. § 46-18-301 (1983). In *Proffitt v. Florida*, 428 U.S. 242 (1976), the Supreme Court held that judicial sentencing in capital cases is constitutionally permissible. See *supra* notes 121-22 and accompanying text.

⁷²³ ALA. CODE § 13A-5-48 (1982); ARK. STAT. ANN. § 41-1302 (1977); CAL. PENAL CODE § 190.3 (West Supp. 1984); DEL. CODE ANN. tit. 11, § 4209(d)(1) (1979); FLA. STAT. ANN. § 921.141(2)(b) (West Supp. 1983); IDAHO CODE § 19-2515(b) (1979); IND. CODE ANN. § 35-50-2-9(e)(2) (Burns Supp. 1983); MD. ANN. CODE art. 27, § 413(h) (1982); MASS. ANN. LAWS ch. 279, § 68 (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-101(2) (Supp. 1983); MO. ANN. STAT. § 565.030.4 (Vernon Supp. 1984); NEB. REV. STAT. § 29-2522 (1979); NEV. REV. STAT. § 175.554(2) (1983); N.J. STAT. ANN. § 2C:11-3(c)(3) (West 1982); N.M. STAT. ANN. § 31-20A-2(B) (1981); N.C. GEN. STAT. § 15A-2000(b) (1983); OHIO REV. CODE § 2929.03(D)(2) (Page 1982); OKLA. STAT. ANN. tit. 21, § 701.11 (West 1983); 42 PA. CONS. STAT. ANN. § 9711(c)(1)(iv) (Purdon 1982); TENN. CODE ANN. § 39-2-203(f)-(g) (1982); WYO. STAT. § 6-2-102(d)(i)(B) (1983).

cumstance found and make imposition of death unjust.”⁷²⁴ The Alabama statute is one of the few that explains how the sentencing authority should conduct the weighing process:

The process . . . of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and ‘considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death.’⁷²⁵

The Nebraska statute seems to favor leniency in close cases since the death penalty may be withheld when “sufficient mitigating circumstances exist which *approach* or exceed the weight given to the aggravating circumstances.”⁷²⁶

Fifteen states do not expressly require that sentencing authorities conduct a weighing process between aggravating and mitigating circumstances in capital cases.⁷²⁷ The Arizona law provides that the sentencing court “shall take into account the aggravating and mitigating circumstances . . . and shall impose a sentence of death if [it] finds one or more of the aggravating circumstances . . . and that there are not mitigating circumstances sufficiently substantial to call for leniency.”⁷²⁸ New Hampshire simply requires the sentencing jury to find at least one statutory aggravating circumstance before it “may fix the sentence of death.”⁷²⁹ In Washington, the court submits the following question to the jury: “Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there

⁷²⁴ IDAHO CODE § 19-2515(b) (1979). A similar statute, N.M. STAT. ANN. § 31-20A-2(B) (1981), provides that “[a]fter weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the jury or judge shall determine whether the defendant should be sentenced to death or life imprisonment.”

⁷²⁵ ALA. CODE § 13A-5-48 (1982). *See also* MASS. ANN. LAWS ch. 279, § 68 (Michie/Law. Co-op. Supp. 1984) (providing similar explanation of weighing process).

⁷²⁶ NEB. REV. STAT. § 29-2522 (1979) (emphasis added).

⁷²⁷ ARIZ. REV. STAT. ANN. § 13-703(E) (Supp. 1983); COLO. REV. STAT. § 16-11-103(4) (Supp. 1983); CONN. GEN. STAT. § 53a-46a(e) (1983); GA. CODE § 17-10-31 (1982); ILL. ANN. STAT. ch. 38, § 9-1(g) (Smith-Hurd Supp. 1983); KY. REV. STAT. ANN. § 535.025(1)(b) (Baldwin 1983); LA. CODE CRIM. PROC. ANN. art. 905.3 (West Supp. 1984); MONT. CODE ANN. § 46-18-305 (1983); N.H. REV. STAT. ANN. § 630:5(IV) (Supp. 1983); S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-4 (1979); TEX. CODE CRIM. PROC. ANN. art. 31.071(e) (Vernon 1981); UTAH CODE ANN. § 76-3-207(3) (Supp. 1983); VA. CODE § 19.2-264.4(C) (1983); WASH. REV. CODE ANN. § 10.95.030(2) (Supp. 1984).

⁷²⁸ ARIZ. REV. STAT. ANN. § 13-703(E) (Supp. 1983).

⁷²⁹ N.H. REV. STAT. ANN. § 630:5(IV) (Supp. 1983).

are not sufficient mitigating circumstances to merit leniency?"⁷³⁰ An affirmative answer by a unanimous jury mandates imposition of the death penalty.⁷³¹

Most states expressly require the sentencing authority to find at least one statutory aggravating circumstance beyond a reasonable doubt before it can impose a death sentence.⁷³² In Virginia, the sentencing jury cannot impose a death sentence unless it finds beyond a reasonable doubt that "there is a probability . . . that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society,"⁷³³ or that his crime was particularly heinous.⁷³⁴ In Texas, the jury may sentence the defendant to death if it expressly finds that the defendant deliberately acted to cause death, that he is likely to commit future criminal acts of violence, and that his response to provocation, if any, was unreasonable.⁷³⁵ In contrast, the Colorado and Connecticut statutes provide that the sentencing authority may not impose a death sentence if it finds any statutory mitigating circumstances, even if it also finds several aggravating circumstances.⁷³⁶

If the jury is unable to reach a unanimous verdict at the sentencing stage, twenty states expressly provide that the court must sentence the defendant to life imprisonment.⁷³⁷ In at least two states where the stat-

⁷³⁰ WASH. REV. CODE ANN. § 10.95.060(4) (Supp. 1984).

⁷³¹ WASH. REV. CODE ANN. § 10.95.080(1) (Supp. 1984).

⁷³² ALA. CODE § 13A-5-45(f) (1982); ARIZ. REV. STAT. ANN. § 13-703(E) (Supp. 1983); ARK. STAT. ANN. § 41-1302 (1977); CAL. PENAL CODE §§ 190.1, 190.3 (West Supp. 1984); COLO. REV. STAT. § 16-11-103(4) (Supp. 1983); CONN. GEN. STAT. § 53a-46a(e) (1983); DEL. CODE ANN. tit. 11, § 4209(d)(1)(a) (1979); FLA. STAT. ANN. § 921.141(2) (West Supp. 1983); GA. CODE § 17-10-31 (1982); IDAHO CODE § 19-2515(b) (1979); ILL. ANN. STAT. ch. 38, § 9-1(g) (Smith-Hurd Supp. 1983); IND. CODE ANN. § 35-50-2-9(c)(1) (Burns Supp. 1983); LA. CODE CRIM. PROC. ANN. art. 905.3 (West Supp. 1984); MD. ANN. CODE art. 27, § 413(g), (h) (1982 & Supp. 1983); MASS. ANN. LAWS ch. 279, § 68 (Michie/Law. Co-op. Supp. 1984); MO. ANN. STAT. § 565.030.4(1) (Vernon Supp. 1984); NEV. REV. STAT. § 175.554(3) (1983); N.C. GEN. STAT. § 15A-2000(c)(1) (1983); OHIO REV. CODE ANN. § 2929.03(B), (C) (Page 1982); OKLA. STAT. ANN. tit. 21, § 701.11 (West 1983); S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-203(f) (1982); TEX. CODE CRIM. PROC. ANN. art. 37.071(c) (Vernon 1981); VA. CODE § 19.2-264.4(C) (1983); WASH. REV. CODE ANN. § 10.95.030(2) (Supp. 1984); WYO. STAT. § 6-2-102(e) (1983).

⁷³³ VA. CODE § 19.2-264.4(C) (1983). For an argument that inquiries into a capital defendant's future dangerousness should not be permitted, see *supra* note 292.

⁷³⁴ VA. CODE § 19.2-264.4(C) (1983). The Virginia death penalty statute is discussed at *supra* notes 626-28 and accompanying text.

⁷³⁵ TEX. CODE CRIM. PROC. ANN. art. 37.071(b), (e) (Vernon 1981 & Supp. 1984). The Texas death penalty statute is discussed at *supra* notes 621-25 and accompanying text.

⁷³⁶ COLO. REV. STAT. § 16-11-103(4) (Supp. 1983); CONN. GEN. STAT. § 53a-46a(e) (1983).

⁷³⁷ ARK. STAT. ANN. § 41-1302(3) (1977); COLO. REV. STAT. § 16-11-103(4) (Supp. 1983); DEL. CODE ANN. tit. 11, § 4209(d)(3) (1979); ILL. ANN. STAT. ch. 38, § 9-1(g) (Smith-Hurd Supp. 1983); MD. ANN. CODE art. 27, § 413(k)(2) (1982); MISS. CODE ANN. § 99-19-101(3) (Supp. 1983); MO. ANN. STAT. § 565.030.4 (Vernon Supp. 1984); N.H. REV. STAT. ANN. § 630:5(V) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(c)(3)(c) (West 1982); N.M. STAT. ANN. § 31-20A-3 (1981); N.C. GEN. STAT. § 15A-2000(b) (1983); OHIO REV. CODE ANN.

ute does not address this issue, courts have directed the trial court to impose a life sentence if the jury cannot unanimously agree on capital punishment.⁷³⁸ The Massachusetts and Washington statutes simply provide that a jury decision in favor of the death sentence must be unanimous.⁷³⁹ In California if the sentencing jury cannot reach a unanimous decision, a new jury is selected; if the new jury cannot agree, the trial court has the discretion to empanel a third jury or to impose a sentence of imprisonment.⁷⁴⁰ Two states give the sentencing decision to the trial judge or to a panel of judges if all twelve jury members cannot agree on the fate of a capital defendant within a reasonable period of time.⁷⁴¹ The Florida and Indiana statutes do not bind the trial court to follow even unanimous jury sentencing recommendations.⁷⁴²

APPELLATE REVIEW OF DEATH SENTENCES

All thirty-six states with valid death penalty statutes require automatic appellate review of death sentences.⁷⁴³ Typically, the individual state's highest court will review a death sentence even when the capital defendant has not moved for an appeal. The Delaware statute, for example, requires that the Delaware Supreme Court receive a complete transcript of the sentencing hearing when a condemned defendant does not appeal his death sentence within thirty days.⁷⁴⁴ In addition, many states specify that the condemned person shall not be executed if the state's highest court determines that the sentence was imposed "under the influence of passion or prejudice or any other arbitrary factor"⁷⁴⁵ or

§ 2929.03(D)(2) (Page 1982); OKLA. STAT. ANN. tit. 21, § 701.11 (West 1983); 42 PA. CONS. STAT. ANN. § 9711(c)(1)(iv) (Purdon 1982); S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 1983); TENN. CODE ANN. § 39-2-203(h) (1982); TEX. CODE CRIM. PROC. ANN. art. 37.071(e) (Vernon 1981); UTAH CODE ANN. § 76-3-207(3) (Supp. 1983); VA. CODE § 19.2-264.4(E) (1983); WYO. STAT. § 6-2-102(e) (1983).

⁷³⁸ See *Miller v. State*, 237 Ga. 557, 559, 229 S.E.2d 376, 377 (1976); *State v. Sonnier*, 402 So. 2d 650, 657 (La. Sup. Ct. 1981).

⁷³⁹ MASS. ANN. LAWS ch. 279, § 68 (Michie/Law. Co-op. Supp. 1984); WASH. REV. CODE ANN. § 10.95.060(3) (Supp. 1984).

⁷⁴⁰ CAL. PENAL CODE § 190.4(a) (West Supp. 1984).

⁷⁴¹ IND. CODE ANN. § 35-50-2-9(f) (Burns Supp. 1983); NEV. REV. STAT. § 175.556 (1983).

⁷⁴² FLA. STAT. ANN. § 921.141(2) (West Supp. 1983); IND. CODE ANN. § 35-50-2-9(e) (Burns Supp. 1983). In *Spaziano v. Florida*, 104 S. Ct. 3154, 3156 (1984), the Supreme Court upheld Florida's procedure in capital cases allowing a trial court to override a jury's recommendation of a life sentence, concluding that "[t]here is no constitutional requirement that a jury's recommendation of life imprisonment in a capital case be final so as to preclude the trial judge from overriding the jury's recommendation and imposing the death sentence."

⁷⁴³ See *Pulley v. Harris*, 104 S. Ct. 871, 876 (1984).

⁷⁴⁴ DEL. CODE ANN. tit. 11, § 4209(g) (1979).

⁷⁴⁵ COLO. REV. STAT. § 16-11-103(7) (Supp. 1983). See also CONN. GEN. STAT. § 53a-46b(1) (1983); DEL. CODE ANN. tit. 11, § 4209(g)(2)(a) (1979); KY. REV. STAT. ANN. § 532.075(3)(a) (Baldwin Supp. 1983); MD. ANN. CODE art. 27, § 414(e)(1) (1982); MASS. ANN. LAWS ch. 279, § 71(1) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-105(3)(a) (Supp. 1983); MO. ANN. STAT. § 565.035.3 (Vernon Supp. 1984); MONT. CODE

that the evidence presented does not support the finding of statutory aggravating circumstances.⁷⁴⁶

Most states allowing capital punishment also require the reviewing court to conduct comparative proportionality review of all death sentences.⁷⁴⁷ Comparative proportionality review ensures that no person will be executed if the penalty would be "disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant."⁷⁴⁸ The death penalty laws in twenty-six states expressly require comparative proportionality review.⁷⁴⁹ In Nebraska, for example, the statute provides:

In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the [Nebraska] Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.⁷⁵⁰

ANN. § 46-18-310(1) (1983); N.H. REV. STAT. ANN. § 630:5(VII)(a) (Supp. 1983); N.M. STAT. ANN. § 31-20A-4(C)(3) (1981); N.C. GEN. STAT. § 15A-2000(d)(2) (1983); OKLA. STAT. ANN. tit. 21, § 701.13(C)(1) (West 1983); 42 PA. CONS. STAT. ANN. § 9711(h)(3)(i) (Purdon 1982); S.C. CODE ANN. § 16-3-25(C)(1) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-12(1) (1979); TENN. CODE ANN. § 39-2-205(c)(1) (1982) ("in any arbitrary fashion"); VA. CODE § 17-110.1(C)(1) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.130(2)(c) (Supp. 1984); WYO. STAT. § 6-2-103(d)(i) (1983).

⁷⁴⁶ COLO. REV. STAT. § 16-11-103(7) (Supp. 1983); CONN. GEN. STAT. § 53a-46b(b)(2) (1983); DEL. CODE ANN. tit. 11, § 4209(g)(2)(b) (1979); KY. REV. STAT. ANN. § 532.075(3)(b) (Baldwin 1983); MD. ANN. CODE art. 27, § 414(e)(2) (1982); MASS. ANN. LAWS ch. 279, § 71(2) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-105(3)(b) (Supp. 1983); MO. ANN. STAT. § 565.035.3 (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-310(2) (1983); N.H. REV. STAT. ANN. § 630:5(VII)(b) (Supp. 1983); N.M. STAT. ANN. § 31-20A-4(C)(1) (1981); N.C. GEN. STAT. § 15A-2000(d)(2) (1983); OKLA. STAT. ANN. tit. 21, § 701(C)(2) (West 1983); 42 PA. CONS. STAT. ANN. § 9711(h)(3)(ii) (Purdon 1982); S.C. CODE ANN. § 16-3-25(C)(2) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-12(2) (1979); TENN. CODE ANN. § 39-2-205(c)(2) (1982); WASH. REV. CODE ANN. § 10.95.130(2)(a) (Supp. 1984); WYO. STAT. § 6-2-103(d)(ii) (1983).

⁷⁴⁷ *Pulley v. Harris*, 104 S. Ct. 871, 876 (1984).

⁷⁴⁸ 42 PA. CONS. STAT. ANN. § 9711(h)(3)(iii) (Purdon 1982).

⁷⁴⁹ ALA. CODE § 13A-5-53 (Supp. 1983); CONN. GEN. STAT. § 53a-46b(b)(3) (1983); DEL. CODE ANN. tit. 11, § 4209(g)(2) (1979); GA. CODE § 17-10-35(c)(3) (1982); IDAHO CODE § 19-2827(c)(3) (1979); KY. REV. STAT. ANN. § 532.075(3)(c) (Baldwin Supp. 1983); MD. ANN. CODE art. 27, § 414(e) (1982); MASS. ANN. LAWS ch. 279, § 71(4) (Michie/Law. Co-op. Supp. 1984); MISS. CODE ANN. § 99-19-105(3)(c) (Supp. 1983); MO. ANN. STAT. § 565.035.3(3) (Vernon Supp. 1984); MONT. CODE ANN. § 46-18-310 (1983); NEB. REV. STAT. § 29-2521.01(5), 29-2521.03 (1979); NEV. REV. STAT. § 177.055(2) (1983); N.H. REV. STAT. ANN. § 630:5(VII)(c) (Supp. 1983); N.J. STAT. ANN. § 2C:11-3(e) (West 1982); N.M. STAT. ANN. § 31-20A-4(C)(4) (1981); N.C. GEN. STAT. § 15A-2000(d)(2) (1983); OHIO REV. CODE ANN. § 2929.05(A) (Page 1982); OKLA. STAT. ANN. tit. 21, § 701.13(C)(3) (West 1983); 42 PA. CONS. STAT. ANN. § 9711(h)(3)(iii) (Purdon 1982); S.C. CODE ANN. § 16-3-25(C)(3) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-12(3) (1979); TENN. CODE ANN. § 39-2-205(c)(4) (1982); VA. CODE § 17-110.1(C)(2) (Supp. 1983); WASH. REV. CODE ANN. § 10.95.130(2)(b) (Supp. 1984); WYO. STAT. § 6-2-103(d)(iii) (1983).

⁷⁵⁰ NEB. REV. STAT. § 29-2521.01(5) (1979). *See also* NEB. REV. STAT. § 29-2521.03

In Louisiana, the rules of the state supreme court require comparative proportionality review.⁷⁵¹ Finally, the courts in at least four states have held that proportionality review must be undertaken whenever the death penalty is imposed.⁷⁵²

Despite a consensus among states that comparative proportionality review is necessary in capital cases, the Supreme Court, in *Pulley v. Harris*,⁷⁵³ recently held that the eighth and fourteenth amendments do not require state appellate courts to compare the penalties imposed in similar cases before a death sentence can be carried out.⁷⁵⁴

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(1979) ("[n]o sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances").

⁷⁵¹ LA. SUP. CT. R. 905.9.1, § 1 (applicable to LA. CODE CRIM. PROC. ANN. art. 905.9 (West Supp. 1984)).

⁷⁵² See *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976); *Collins v. State*, 261 Ark. 195, 221, 548 S.W.2d 106, 120 (1977); *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973); *People v. Gleckler*, 82 Ill. 2d 145, 161-62, 411 N.E.2d 849, 856-57 (1980). Although the Texas Supreme Court has not held that comparative proportionality review is required, some Texas appellate courts have undertaken such review on their own initiative. See, e.g., *Roney v. State*, 632 S.W.2d 598, 603 (Tex. Crim. App. 1982) (en banc). In Indiana, proportionality review apparently does not involve a comparison of other cases; review is limited to the facts of the case at bar. See *Williams v. State*, 430 N.E.2d 759, 764-65 (1982) (defendant sentenced to death while his accomplices received less severe sentences). The Utah Supreme Court will consider a claim that a death sentence is disproportionate, but that court has not clearly indicated whether it will conduct comparative proportionality review in all death penalty cases. See *State v. Pierre*, 572 P.2d 1338, 1345 (Utah 1977). The Colorado statute provides for a review of the substantive "propriety" of each death sentence, but does not expressly require proportionality review. COLO. REV. STAT. § 16-11-103(7)(a), (b) (Supp. 1983). The Colorado Supreme Court has yet to define the scope and method of this review. See Brief for Respondent, app. A at 3a, *Pulley v. Harris*, 104 S. Ct. 871 (1984).

⁷⁵³ 104 S. Ct. 871 (1984).

⁷⁵⁴ *Id.* at 876-80. For a discussion of *Harris*, see *supra* notes 436-68 and accompanying text.